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Ontario

ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 101

DATE: Tuesday, May 9th, 1989

BEFORE:
M.I. JEFFERY, Q.C., Chairman
E. MARTEL, Member
A. KOVEN, Member



FOR HEARING UPDATES CALL (TOLL-FREE): 1-800-387-8810

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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER of an Order-in-Council
(O.C. 2449/87) authorizing the
Environmental Assessment Board to
administer a funding program, in
connection with the environmental
assessment hearing with respect to the
Timber Management Class
Environmental Assessment, and to
distribute funds to qualified
participants.

Hearing held at the Ramada Prince Arthur
Hotel, 17 North Cumberland St., Thunder
Bay, Ontario, on Tuesday, May 9th,
1989, commencing at 9:00 a.m.

VOLUME 101

BEFORE:

MR. MICHAEL I. JEFFERY, Q.C.	Chairman
MR. ELIE MARTEL	Member
MRS. ANNE KOVEN	Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.)	MINISTRY OF NATURAL
MS. C. BLASTORAH)	RESOURCES
MS. K. MURPHY)	
MS. Y. HERSCHER)	
MR. B. CAMPBELL)	MINISTRY OF ENVIRONMENT
MS. J. SEABORN)	
MR. R. TUER, Q.C.)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN)	ASSOCIATION and ONTARIO
MS. E. CRONK)	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY)	ASSOCIATION
MR. J. WILLIAMS, Q.C.	ONTARIO FEDERATION OF
MR. B.R. ARMSTRONG	ANGLERS & HUNTERS
MR. G.L. FIRMAN	
MR. D. HUNTER	NISHNAWBE-ASKI NATION and WINDIGO TRIBAL COUNCIL
MR. J.F. CASTRILLI)	
MS. M. SWENARCHUK)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
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MR. R. BARNES)	ASSOCIATION
MR. R. EDWARDS)	NORTHERN ONTARIO TOURIST
MR. B. McKERCHER)	OUTFITTERS ASSOCIATION
MR. L. GREENSPOON)	NORTHWATCH
MS. B. LLOYD)	

APPEARANCES: (Cont'd)

MR. J.W. ERICKSON, Q.C.)	RED LAKE-EAR FALLS JOINT
MR. B. BABCOCK)	MUNICIPAL COMMITTEE
MR. D. SCOTT)	NORTHWESTERN ONTARIO
MR. J.S. TAYLOR)	ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL)	GREAT LAKES FOREST
MR. S.M. MAKUCH)	
MR. J. EBBS	ONTARIO PROFESSIONAL FORESTERS ASSOCIATION
MR. D. KING	VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. D. COLBORNE	GRAND COUNCIL TREATY #3
MR. R. REILLY	ONTARIO METIS & ABORIGINAL ASSOCIATION
MR. H. GRAHAM	CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN	DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC	MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES	ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI	BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY
MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON

(iii)

APPEARANCES: (Cont'd)

MR. C. BRUNETTA

NORTHWESTERN ONTARIO
TOURISM ASSOCIATION

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Reply

Mr. Castrilli (FFT).....16909

Scoping Session (Panels 12 & 13).....16951

Community Hearing.....16983

1 ---Upon commencing at 9:12 a.m.

2 THE CHAIRMAN: Good morning, ladies and
3 gentlemen. We apologize for the delay.

4 MS. MURPHY: Thank you. When we left off
5 yesterday I was about to start the discussion of the
6 law. Again, just to remind you, what you will need is
7 my Statement of Fact and Law, my book of authorities,
8 and also Mr. Castrilli's book of authorities.

9 And what I propose to do, Mr. Chairman,
10 is to take you through our argument on the law. I
11 think it's important for the purposes of this motion to
12 look very closely at the law, keeping in mind that the
13 purpose of this motion is to ask this Board to compel
14 us to call a witness or to call evidence. I think it
15 is good law and I think it's important for you to keep
16 it in mind.

17 Once I have finished, what I would like
18 to do is respond to some questions. I think they are
19 fair questions and I think there are things that I
20 would have dealt with probably on the scoping session,
21 but I think at this point, given the questions that
22 have been raised, it would be helpful to the Board in
23 their consideration of this matter to have a general
24 indication of the structure of the case or theory of
25 the case and why we are approaching the case in the way

1 we are. So I would like to explain that to you at the
2 end.

3 THE CHAIRMAN: Is that the entire case or
4 the...

5 MS. MURPHY: This part of the case. I
6 don't think we really want to go through the rest of it
7 today.

8 So we start on page 13. And I pointed
9 out - and this is similar to the other people who have
10 spoken to you today -- or yesterday it was - that the
11 first issue is: Does the Environmental Assessment
12 Board have jurisdiction to consider any evidence on the
13 potential human health effects of the pest control
14 products the proponent proposes to use within the area
15 of the undertaking.

16 And, of course, as it is clear, our
17 position on that is that, yes, this Board does have
18 jurisdiction to consider that matter.

19 Our point is that at this point in time
20 the only issue being put before you today is the
21 sufficiency of the evidence that's being led with
22 respect to that matter. And it is our view that you
23 cannot assess the sufficiency of that evidence until
24 obviously you have heard it and it has been tested with
25 cross-examination. At the very earliest, we would

1 suggest that's the first time you could assess the
2 sufficiency of the evidence.

3 We will also be advising that it's our
4 respectful view and that it's the practice and
5 procedure of the Environmental Assessment Board that in
6 fact the Board assesses the evidence of all parties in
7 coming to a determination on the sufficiency of the
8 evidence, and I will be speaking to that in more detail
9 in a few minutes.

10 You will see we have set out again for
11 you --

12 THE CHAIRMAN: That's with respect to the
13 determination of the overall application?

14 MS. MURPHY: That's with respect to the
15 determination of the sufficiency of the evidence on any
16 one matter, and I am going to show you a case where in
17 fact that was done, where the Board actually considered
18 the evidence of all parties in determining the
19 sufficiency of the evidence on a particular matter.

20 THE CHAIRMAN: Bear in mind, Ms. Murphy,
21 there is no stare decisis with Environmental Assessment
22 Board decisions in previous cases.

23 MS. MURPHY: I think that the thinking of
24 the other Board members in the practice would be
25 persuasive, however.

1 We pointed out in paragraph 22 that the
2 Ministry of Natural Resources relies on the Pest
3 Control Products Act and the Pesticides Act in Ontario
4 as prima facie evidence that the pest control products
5 used by the Ministry of Natural Resources have been
6 approved for use and that that process deals with the
7 potential human health effects of pest control products
8 and actions necessary to ensure an acceptable level of
9 risk.

10 I think it's very important to understand
11 that it's our view that a proponent has a right, at
12 least at first instance, to rely on existing regulatory
13 processes to deal with the matters that it's
14 discussing.

15 That being the case, the argument at this
16 point is that while the Board has jurisdiction
17 certainly to consider the matter, it is premature at
18 this point in time certainly to determine whether the
19 evidence is sufficient.

20 With respect to the second matter, which
21 I have starting on page 14, which is jurisdiction to
22 compel the calling of a witness. And you've heard --

23 THE CHAIRMAN: Excuse me, just going back
24 to your last statement for a second. Is it your
25 position that if you are going to rely on previous

1 decisions of other regulatory authorities you can rely
2 on the decision itself or, in effect, are you relying
3 upon the material or studies that led to the decision
4 of the other regulatory authorities?

5 And if it is the latter, is it your
6 position that those studies or material upon which the
7 other regulatory authorities relied do not have to be
8 produced, you can just rely on the decision?

9 MS. MURPHY: It is our view that at least
10 in first instance a proponent can rely on the actual
11 decisions of other regulatory agencies and that they
12 don't need to go behind that and reprove to the
13 Environmental Assessment Board that each of those
14 decisions was reasonable and that it was right in the
15 circumstances.

16 You have to bear in mind that there is a
17 whole host of regulatory system out there that has an
18 effect on what happens in this undertaking and in other
19 undertakings.

20 And I will give you another example, if I
21 might. You will appreciate, for example, that the pest
22 control products, for example, that we are dealing with
23 are applied from airplanes and that there is a huge
24 regulatory system that deals with licensing of pilots,
25 licensing of airplanes, how you build airports, so on

1 and so forth.

2 It is our view that we don't have to come
3 here and prove to you all the rationale and background
4 and reasons for all of those processes as well and the
5 regulations that come from that.

6 THE CHAIRMAN: Do you also take the
7 position that if you don't have to prove the validity
8 of the studies and materials that went into the
9 decision of another regulatory authority, that you may
10 nevertheless have to prove that the process undertaken
11 by another regulatory authority was both reasonable,
12 comprehensive and, in fact, considered the appropriate
13 issues?

14 MS. MURPHY: I think what we have to
15 convince you of is that it is reasonable for us to rely
16 on the other process and that's --

17 THE CHAIRMAN: How do you get to that
18 point?

19 MS. MURPHY: Well, I think that's the
20 problem and I think that is the heart of the matter,
21 and what we have to do is lead what we can and it's
22 on -- it's our judgment as to what evidence we need to
23 lead, and I will get to what would happen if we don't
24 meet that in a minute. But what we have to do is lead
25 enough to convince you that it is reasonable to rely on

1 that process.

2 But that's why I say that's not the end
3 of the matter. That's why I say, in first instance,
4 it's our position that that is what we have to do and
5 that is what we intent to do. But that's why we say
6 the matter is not then irrelevant. That's what happens
7 in some of the U.S. cases, for example. The person who
8 is relying on the regulatory process says: That's it,
9 that's all, you can't think about it anymore.

10 Those are the cases where the court has
11 decided, quite correctly in our view, that that
12 position is wrong, that we can't simply say the process
13 is there and, therefore, you can't think about it
14 anymore. What we say is: We are here to show you what
15 the process is, if someone else wants to tell you that
16 it's wrong to rely on that for some specific reason, we
17 aren't saying to you you can't hear that evidence. We
18 aren't saying that it's beyond your jurisdiction to
19 hear the views of other people on that.

20 And that's why I say the decision that
21 you make about whether it is reasonable to rely on that
22 process really has to be made hearing all the evidence
23 and hearing perhaps evidence that people might want to
24 lead that says it is not reasonable to rely on that
25 process.

1 Okay. Now, with respect to jurisdiction
2 to compel the calling of a witness - just so that we
3 don't leave that hanging - that's exactly why we say
4 that the issue that we are dealing with is within the
5 jurisdiction of the Board, and we speak a little later
6 about what that whole concept of improper delegation
7 means. And, in our view, that's what it means, that
8 you can take consideration and probably a fair amount
9 of weight can be put -- in our view, a lot of weight
10 can be put on that process, but we are not suggesting
11 that you can't go any further. And that's what those
12 other cases are about.

13 THE CHAIRMAN: Well, apart from the
14 decision, Ms. Murphy, on whether or not the Board has
15 jurisdiction to compel the Ministry to call particular
16 witnesses or to put into evidence certain studies, et
17 cetera, if you are taking the position that we have the
18 jurisdiction under the Environmental Assessment Act to
19 consider the effect of pesticides on human health, then
20 presumably, although it may not be reasonable for the
21 Board to do so, we do have the jurisdiction to, in
22 effect, reinvent the wheel in this case if we so
23 wished.

24 MS. MURPHY: Well, I suppose in the broad
25 sense, if there was evidence before you on something

1 specific that would require you to come to a different
2 decision than was arrived at by the other regulatory
3 agency, certainly I think that's true.

4 You asked Ms. Cronk, for example, whether
5 there would be circumstances where, notwithstanding the
6 decision of someone else, you could come up with a
7 different decision and she advised you that it was her
8 view that of course you could, and I think that's true.

9 THE CHAIRMAN: Okay. Well, I think that
10 pretty well settles the jurisdiction issue--

11 MS. MURPHY: Yes.

12 THE CHAIRMAN: --in terms of whether or
13 not the Board has jurisdiction to look into these
14 matters, as distinctly opposed to whether we have the
15 jurisdiction to compel certain evidence to be brought
16 before us.

17 So I don't think you have to spend a lot
18 more time on whether or not we've got jurisdiction.

19 MS. MURPHY: Fine.

20 THE CHAIRMAN: I don't think anybody is
21 opposing it essentially based on the arguments today.

22 MS. MURPHY: I don't think so either once
23 you really look at it closely.

24 With respect to jurisdiction to compel a
25 calling of a witness, you have heard the law about that

1 from Mr. Campbell and from Ms. Cronk and basically of
2 course our position is the same, that the calling of
3 the witnesses and the decision on which witnesses
4 should be called and what evidence should be led is the
5 responsibility of the parties and counsel for the
6 parties.

7 And there are -- you heard the law about
8 that, you heard that essentially in this kind of
9 process it is really reasonable and that's the common
10 way to do things and that there really doesn't appear
11 to be any reason to take this out of the normal
12 situation.

13 I would comment on the issue about
14 whether the rule -- your rule, Rule 4, is procedural in
15 nature and whether it allows you in substance to compel
16 the calling of a witness.

17 I think, Mr. Chairman, you put your
18 finger on it yourself when you said to Mr. Castrilli:
19 Are you asking for procedural compliance or are you
20 asking for, in effect - these weren't your words - what
21 you think is compliance with the statute. And I think
22 clearly what he is asking for is something of
23 substance, compliance with the statute.

24 THE CHAIRMAN: Well, I can just say that
25 it has been the Board's interpretation to date - you

1 must realize that these rules are relatively new --

2 MS. MURPHY: Mm-hmm.

3 THE CHAIRMAN: --that that Section 4 --
4 Rule 4 is aimed at procedural compliance as opposed to
5 statutory compliance.

6 MS. MURPHY: Right. Mr. Castrilli, in
7 effect, in his argument in his paper -- rather his - I
8 will speak to his paper in a minute - but his Statement
9 of Fact and Law has suggested in a sense that the Board
10 has some duty to ensure that the evidence is
11 sufficient, and I would like to speak to that in a
12 minute.

13 But I think what is important is to bear
14 in mind that the duty of this Board is to hold a fair
15 hearing and to render a decision on the evidence put
16 before it, and that's the basic duty of this Board.

17 Now, there is a practical aspect to this
18 that I think you should keep in mind, it's very
19 important. First of all, at the end of this case or at
20 some stage in this case the Board is going to make a
21 decision based on the sufficiency of the evidence and
22 the Board will write down its reasons for coming to a
23 certain conclusion and they will be assessing the
24 sufficiency of the evidence that was led before it in
25 coming to that conclusion.

1 Logically I find it difficult to
2 understand how the Board can assess the sufficiency of
3 the evidence when, in effect, the evidence ends up
4 being put in in first instance at the instance of the
5 Board. There is a logical problem with that.

6 There is a practical problem as well and
7 that is that when one makes decisions about what
8 evidence to call and which way to structure the case, a
9 person who does that - we do that with our client and
10 everyone else does it with their clients - the person
11 who does that can make a mistake. And I think it
12 should be fairly clear that if a mistake is made in
13 this hearing about the leading of evidence, it should
14 be our mistake.

15 Now, I am going to take you to the next
16 part but, of course, as it is fairly clear it is our
17 position that the Board does not have jurisdiction to
18 compel the calling of a witness. But I think in order
19 to look at that more closely we really have to go to
20 the next part, and I have called that: The Requirement
21 to Call Evidence. Because the question really seems to
22 me to be: If the Board does have jurisdiction to
23 compel the calling of evidence and the calling of a
24 witness, it would be very unusual and one would have to
25 consider where that jurisdiction would come from.

1 So I'll ask you to look at page 17 under
2 my paragraph 33, and I'm suggesting that if the Board
3 intends to direct the calling of particular evidence it
4 must be because it has a positive duty to do so. If
5 you have no duty to compel -- if you have no duty to
6 have this evidence before you, then there is no reason
7 for you to compel anyone to call it. If there is no
8 duty for you to do this, then the duties are ours.

9 If you look at what I have here under my
10 No. 31 then, it is my respectful view that the only way
11 you could get into a situation where you had a duty in
12 fact to supplement the evidence would be if Section
13 5(3) of the Environmental Assessment Act imposes
14 statutory preconditions to the assumption of
15 jurisdiction by the Environmental Assessment Board.

16 Now, Mr. Castrilli says he's not taking
17 the position that Section 5(3) imposes statutory
18 preconditions to the assumption of jurisdiction, what
19 he says is Section 5(3) says what things we have to do
20 before you can make a decision. That is a distinction
21 without a difference. That is exactly the same thing.
22 What he is suggesting to you is that you must order us
23 to call this evidence or you will not have sufficient
24 evidence and can't make a decision.

25 So I will be speaking to Section 5(3),

1 and I suggest he has to be successful on that.
2 Secondly, he has to be successful in saying that the
3 respondent intends to call no evidence with respect to
4 potential human health effects. And in order to be
5 successful on that, Mr. Chairman, it's our view that he
6 has to convince you that the decisions of other
7 specialist agencies and the government standards in
8 existence have no probative value and, therefore,
9 constitute no evidence. In our respectful view, that
10 can't happen.

11 When one looks at the Environmental
12 Assessment Act - and we have to keep in mind that we
13 are looking at the Ontario Environmental Assessment Act
14 which is, in substance, different from the legislation
15 in other jurisdictions - the point is that the Minister
16 or, in this case, the Board is expected to look at the
17 evidence provided under Section 5(3), the evidence
18 provided in the environmental assessment and other
19 evidence to determine whether the evidence is
20 sufficient and to determine whether, on that basis, the
21 information he has is satisfactory to allow a decision
22 to be made. And those words, I would suggest, are
23 inconsistent with the idea that the Minister can't or
24 that the Board can't consider the totality of the
25 evidence before making a decision.

1 THE CHAIRMAN: Ms. Murphy, have you given
2 any consideration to the provisions of Section 11 of
3 the Environmental Assessment Act which sets out certain
4 powers with respect to the Minister and considered as
5 to whether or not any of the provisions of Section 11
6 also apply to the Board and, in particular, the part of
7 the section that indicates that:

8 "Where the Minister considers that the
9 assessment is inconclusive or otherwise
10 unsatisfactory to enable a decision to be
11 made--"

12 MS. MURPHY: Right.

13 THE CHAIRMAN: "--as to whether approval
14 to proceed with the undertaking should be
15 or should not be given, he may require
16 the proponent to carry out such research,
17 investigations, studies, et cetera..."
18 And then there is a process for having
19 that reviewed in certain circumstances and public
20 comment, et cetera. Now, obviously we are not under--

21 MS. MURPHY: Section 11.

22 THE CHAIRMAN: --Section 11 because we
23 are holding a hearing. But does the Board, in your
24 view, have any of those powers that are implied by that
25 section in terms of requiring further evidence?

1 MS. MURPHY: I would have a couple of
2 comments to make about this one first and then I would
3 ask you to let me set it aside and think about it
4 further because I don't have submissions on this
5 section.

6 THE CHAIRMAN: Very well.

7 MS. MURPHY: Just at first reading and at
8 first glance it seems to appear -- or it appears to me
9 that what it is saying is where, before accepting an
10 environmental assessment; that is, where the Minister
11 has the information before him or her and is at the
12 point of deciding whether to accept, the Minister is of
13 the opinion that more is required.

14 THE CHAIRMAN: I know, but we reach that
15 same stage somewhere--

16 MS. MURPHY: At some point.

17 THE CHAIRMAN: --in this process under
18 Section 12. We have to decide at some point is the
19 environmental assessment acceptable or is it not.

20 Now, you know, I am fully cognizant that
21 this section does not apply directly to the Board in
22 that sense, but it also conveys the concept that there
23 are circumstances, at least when the Minister is
24 deciding the case without a hearing, that the
25 documentation or the evidence before him at that

1 point - it won't be viva voce evidence, it will be
2 documentation - is for some reason not complete enough
3 to enable him to render a decision on whether or not it
4 should proceed; and, by analogy, whether or not it
5 should proceed with respect to a particular portion of
6 it or issue connected with it.

7 MS. MURPHY: Mm-hmm.

8 THE CHAIRMAN: And then it gives him
9 certain powers to demand and require further
10 documentation or further evidence.

11 Can those concepts, in your view - I
12 guess this is the question, and of course you will be
13 given an opportunity to consider it - also apply to the
14 Board?

15 MS. MURPHY: And I would like an
16 opportunity to consider it, but I would just like to
17 point out is what it's saying is that, in those
18 circumstances, the Minister shall give evidence to the
19 proponent, the proponent can make submissions and then
20 in normal practice I am not certain what happens, I
21 would like to consult with my friends at MOE about what
22 happens.

23 But it appears to me on its face that
24 this is intended to be a remedial section that's
25 applied in certain circumstances on applications to the

1 Minister.

2 THE CHAIRMAN: Well, could it be applied
3 in the sense that the Board gives notice to the parties
4 before it that we don't think there is enough, please
5 give us more, and then you have an opportunity at the
6 hearing and all other parties connected with the
7 hearing to discuss what is produced by way of further
8 documentation, cross-examination, et cetera.

9 Again, I am just trying to draw a
10 parallel to that section because the legislature
11 obviously felt that in certain circumstances the
12 Minister, where he makes a decision, may require
13 further evidence.

14 MS. MURPHY: Yes.

15 THE CHAIRMAN: And it may be possible to
16 say that at a hearing the Board, which is standing in
17 the place of the Minister, may also require further
18 evidence. I just ask you to consider it because I
19 don't think that's been dealt with by anybody so far in
20 their argument.

21 MS. MURPHY: I'm glad to be first. Well,
22 I have certainly considered the --

23 MS. CRONK: I don't think that was...

24 MS. MURPHY: I would like to consider the
25 practical implications of that.

1 THE CHAIRMAN: Okay. Anyways, let's go
2 on with where you were.

3 MS. MURPHY: Thank you. Looking at my
4 paragraph 35, I am discussing what Section 5(3) of the
5 Environmental Assessment Act means and what kinds of
6 duties and requirements it imposes on proponents in
7 order to give jurisdiction to the decision-maker.

8 The argument that Section 5(3) actually
9 imposed statutory preconditions before a decision-maker
10 could make a decision or act on the environmental
11 assessment has been considered recently and in fact, in
12 my respectful view, has been decided.

13 And I would ask you to turn to Tab 6 in
14 my book of authorities. This is the case of Temagami
15 Wilderness Society and the Minister of the Environment
16 and the Minister of Natural Resources. This, as you
17 are aware I am sure, is a very recently decided case,
18 April 11th, 1989 in the Divisional Court.

19 Essentially in this case - and this is
20 very important and very relevant to this hearing as a
21 matter of fact - this is a situation where the activity
22 of timber management in Ontario is covered by currently
23 an exemption order - you have heard about that
24 exemption order in this hearing - the exemption order
25 has attached to it a number of terms and conditions,

1 how one goes about doing timber management in Ontario
2 up until the time that a class environmental assessment
3 is filed and until it is approved by this Board. So
4 this case is directly relevant to what we are talking
5 about today.

6 In that situation where the activities -
7 and you are familiar with what they are - of timber
8 management are governed by that exemption order, the
9 Minister of Natural Resources made a decision to submit
10 an individual environmental assessment on a specific
11 road and that was the Red Squirrel Road.

12 THE CHAIRMAN: Excuse me a moment, I
13 having --

14 MS. MURPHY: Tab 6 of my book of
15 authorities.

16 THE CHAIRMAN: Tab 6.

17 MS. MURPHY: I know, my factum says Tab
18 5. It's one of those things, it was perfect when I
19 signed it, but something happened to it after.

20 THE CHAIRMAN: The glitch in the
21 printing, eh?

22 MS. MURPHY: That I don't know.

23 THE CHAIRMAN: Almost like the budget.

24 MS. MURPHY: It happens every time, I
25 don't know why.

1 In any event, this is the factual
2 background behind this case and this case, of course,
3 is about the Red Squirrel Road.

4 And what happens in this case is that
5 Temagami Wilderness Society brought an application to
6 the Divisional Court and the argument they were making
7 in the Divisional Court was that the Minister of the
8 Environment in accepting and approving an environmental
9 assessment acted beyond his jurisdiction because, in
10 their view, the environmental assessment in question
11 did not meet the requirements of Section 5(3) to an
12 objective standard.

13 And that argument is set out in the
14 endorsement of the court which unfortunately is short
15 but to the point at the very beginning of the
16 endorsement where the court explains:

17 "The applicant in argument has submitted
18 to this court that the environmental
19 assessment in issue does not comply with
20 the content requirements of Section 5(3)
21 of the Environmental Assessment Act and,
22 as a result, the Minister of the
23 Environment had no jurisdiction to
24 approve, accept, review or refuse to
25 direct a public hearing or in any way act

1 on the said EA."

2 So this was the argument that was being
3 put forward. The argument went on to say that there
4 was something in particular that that applicant
5 suggested was missing with respect to one of the parts
6 of Section 5(3) and the court goes on to explain:

7 "The Applicant further submitted..."

8 This was the additional point:

9 "...that the said EA was deficient in
10 failing to address problems of forest
11 management which, in the Applicant's
12 view, formed part of the proponent's
13 undertaking that was under
14 consideration."

15 Now, the court, first of all, explains
16 that the forest management portion of the things to be
17 considered are "the subject of a separate undertaking",
18 are the words they use on the second page.

19 I am not entirely sure, not having been
20 there, whether the court when they refer to -- when
21 they say "forest management activities are the subject
22 of a separate undertaking", are referring directly to
23 the exemption order or referring to this hearing, but
24 in any event they are related. They are referring to
25 the fact that there is another decision-maker involved

1 in this.

2 They go on to say -- in considering the
3 sufficiency of the information under Section 5, they go
4 on to say in the paragraph starting:

5 "Notwithstanding the exemption order,
6 we are of the view that the EA document
7 meets the content requirement of
8 Section 5(3) of the Act..."

9 And they point out in what way it does that. They say:

10 "It is apparent upon perusal of the
11 document that it contains a description
12 of the purpose of the undertaking, a
13 statement of the rationale of the
14 undertaking, the alternatives to the
15 undertaking, the alternative methods of
16 carrying out the undertaking, and a
17 description of the environment affected
18 by the road and its effects on the
19 environment."

20 And they make some more comment about
21 some of the other information that's there. In the
22 last full paragraph they say:

23 "As indicated, the content of the EA
24 document was adequate to comply with
25 Section 5(3) of the Act, it also was

1 sufficient for the purposes of acceptance
2 under Section 8 of the Act and,
3 therefore, the Minister had jurisdiction
4 to consider it."

5 THE CHAIRMAN: But surely that decision
6 by the court is a subjective view of that court as to
7 the reasonableness of the EA document in that case?

8 MS. MURPHY: No. With respect, Mr.
9 Chairman, I think what this decision in fact says is
10 that the court is not there to make a subjective
11 decision about the reasonableness of the EA document.

12 In fact, the import of this case is to
13 say that it is the Minister of the Environment or, in
14 another case, the Environmental Assessment Board that
15 assesses the reasonableness of the content and that
16 that is their responsibility. And this court is saying
17 as long as each of those things has something in it, it
18 is those people who decide on the reasonableness of the
19 contents.

20 THE CHAIRMAN: No, but that's what I
21 mean.

22 MS. MURPHY: Right.

23 THE CHAIRMAN: But in this particular
24 case it was the Minister that decided on the
25 sufficiency or the adequacy of the EA. In our case it

1 is the Board.

2 MS. MURPHY: That's right.

3 THE CHAIRMAN: And what I am saying is,
4 is the court is just confirming that where there is a
5 challenge as to the adequacy, it is up to the
6 decision-maker to subjectively decide on the
7 reasonableness of the documentation and, in our case,
8 all of the evidence coming in as well.

9 MS. MURPHY: That's exactly what they are
10 deciding, Mr. Chairman. And because of that my point
11 is this: The court is saying they are not there to
12 make a second assessment and they are not there to
13 decide whether each of those things has to be met
14 perfectly and procedurally.

15 They are saying in Ontario that is not
16 what the court does on judicial review. In Ontario,
17 the reasonableness and the adequacy of the information
18 is up to the Minister and to the Board, unlike what
19 happens in the courts in the American context. That's
20 my point.

21 THE CHAIRMAN: Okay. But I understand
22 that, but is anybody here who has argued -- made
23 submissions to us up to this point taken a contrary
24 position?

25 MS. MURPHY: Well, yes, Mr. Chairman. In

1 my view, for Mr. Castrilli to convince you that you
2 have a positive duty to make sure that there is
3 sufficient evidence on each of the matters under
4 Section 5(3) in order for you to make a decision, that
5 is the position he has to be taking as distinct from
6 the parties lead the evidence and the Board decides on
7 the basis of the evidence led, or the Minister, the
8 sufficiency of the evidence; that unless the Board has
9 some kind of positive duty and responsibility to ensure
10 that the evidence is sufficient, that the sufficiency
11 of the evidence has to be assessed by the Board on the
12 basis of the evidence that's put to them.

13 You see, his argument that you can and
14 should compel evidence is based on his argument that
15 you cannot adjudicate on this matter without that
16 evidence and that, therefore, you should do something
17 about it. And it is our view that that is not correct.

18 THE CHAIRMAN: Well, it seems to us that
19 we can adjudicate, we can adjudicate negatively.

20 MS. MURPHY: That's right.

21 THE CHAIRMAN: And we can dismiss the
22 application--

23 MS. MURPHY: That's right.

24 THE CHAIRMAN: --should we feel that it's
25 insufficient in terms of the evidence. But the further

1 question is: Should we and do we have to accept that
2 as the only option as opposed to either indicating
3 strongly that the parties should put forward additional
4 evidence--

5 MS. MURPHY: We are not suggesting that
6 that is the only option.

7 THE CHAIRMAN: --or dealing with it by
8 way of a condition of approval.

9 MS. MURPHY: Mm-hmm.

10 THE CHAIRMAN: Or - and what we are
11 arguing - whether or not we have the jurisdiction to
12 compel the production of evidence through a particular
13 party.

14 MS. MURPHY: Yes. We're not suggesting,
15 of course, that dismissal is the only option. There
16 are a number of options. And certainly, Mr. Chairman,
17 you have heard from other parties that it's not unusual
18 and would be expected that where the Board, or any
19 court as a matter of fact in many situations, is of the
20 view that they would like to hear more, then it's not
21 at all uncommon for the Board to say so or the court.
22 It's taking that extra step that's the problem.

23 THE CHAIRMAN: Okay.

24 MS. MURPHY: I have also cited for your
25 information a case called re City of Thunder Bay

1 Auditorium Theatre Complex and that is at Tab 7 of my
2 book of authorities. And I would still like to take
3 you to that case because I think there's something
4 interesting in it that you should be aware of, and it's
5 not just because we know some of the people who are in
6 it though that adds some spice. Mr. Sutterfield was
7 one of the witnesses.

8 But it was...

9 MR. CAMPBELL: I'm not sure which shirt
10 he was wearing at the time.

11 MR. CASTRILLI: Or if he was wearing one.

12 MS. MURPHY: There are some other people
13 who were witness that will be known to us as well and
14 that's importance, partly just for interest, but it's
15 our view that this case demonstrates that the Board
16 essentially takes the same kind of approach and, as you
17 said yourself, Mr. Chairman, the Board looks at all of
18 the evidence and that all of the evidence is considered
19 at the end of the matter.

20 I would like you to look at this
21 particular case because what's interesting, if you turn
22 to page 392 under the heading: Acceptance of the
23 Environmental Assessment. The Board -- I forget who is
24 writing this one, I think it was Mr. Smith. In any
25 event, the Board starts by saying:

1 "Before a proponent is permitted to
2 proceed with an undertaking, the
3 environmental assessment must be accepted
4 by the Board. Instructions for its
5 minimum content are set out in Section 5
6 of the Environmental Assessment Act."
7 If you go down to the last full
8 paragraph:

9 "The main weakness of the environmental
10 document is its insufficient discussion
11 on the evaluation of the advantages and
12 disadvantages of the undertaking to the
13 environment, particularly with respect to
14 the social, economic and cultural
15 conditions that influence the life of man
16 in the community. This topic is
17 referenced in a very general way only."

18 So the Board is saying, the actual
19 environmental assessment didn't provide them with
20 everything they needed they said that they wanted in
21 order to assess that aspect, that part of Section 5.

22 If you go over the page starting at page
23 393 -- I mean, starting at the middle paragraph::

24 "The Board is required under the Act to
25 determine whether the environmental

1 assessment is satisfactory to enable a
2 decision to be made as to whether
3 approval to proceed with the undertaking
4 should or should not be given, including
5 the imposition of any terms and
6 conditions. This Board has previously
7 held that in coming to this
8 determination, consideration should be
9 given not only to the environmental
10 assessment document prepared in advance
11 of the hearing but also to all evidence
12 and submissions presented at the public
13 hearing."

14 The Board explains:

15 "In resolving the question of a
16 satisfactory environmental assessment
17 particular evidence is drawn to the
18 evidence of Mr. James Foulds, MPP for
19 Port Arthur riding and Mr. Douglas Walter
20 Scott, past President of the Thunder Bay
21 Chamber of Commerce, currently President
22 of Northwest Ontario Chamber of Commerce
23 who will be a witness here. Their
24 evidence gave the Board a better
25 understanding of the economic and social

1 conditions that may be influenced by this
2 undertaking and, therefore, it's our
3 opinion that the information before the
4 Board is satisfactory."

5 These two witnesses were not called by
6 the proponent, Mr. Chairman. I wasn't interested -- it
7 doesn't make that entirely clear, although I imagine
8 Mr. Martel knows Mr. Foulds. We know Mr. Scott and he
9 will be a witness here.

10 I contacted counsel for the proponent in
11 that case Mr. McKittrick, to be entirely sure and
12 these were people from the public who were interested
13 and whose evidence was considered by the Board in, to
14 use the words you asked about yesterday, in shoring up
15 in effect the environmental assessment. So in fact it
16 is all the evidence, Mr. Chairman, and I think --

17 THE CHAIRMAN: Well, I can assure you,
18 Ms. Murphy, there is no doubt in the Board's mind that
19 the process includes more than the documentation and
20 all of the evidence considered by the Board and
21 admitted by the Board in the course of a hearing. We
22 have taken that position on a number of occasions and I
23 think had sort of a lengthy--

24 MS. MURPHY: There are a number of cases
25 that speak to this, that's true.

1 THE CHAIRMAN: --decision and my dissent
2 on a Red Hill Creek Expressway case that sort of dealt
3 with that issue as well. There's also a number of
4 cases that the Board has dealt with wherein we have
5 gone out of our way, if I might put it that way, not to
6 reject an application solely on the question of the
7 adequacy or inadequacy of the assessment without
8 considering the matter in the totality so that we could
9 also render the decision on whether or not the
10 undertaking would proceed.

11 And the reason for that is, it's a
12 practical one, that in many hearings, many of which
13 take an extremely lengthy time to put in, it doesn't
14 seem to serve the public interest if at the end of the
15 proceedings the Board makes a decision that the EA is
16 inadequate and you stop there because it doesn't allow
17 us to render a decision on the undertaking proceeding
18 or not, and everybody goes home presumably to come back
19 at some stage with a fresh EA or an amended EA and
20 start all over again.

21 And it seems to us at the end of these
22 lengthy proceedings the public is entitled to a
23 decision on the so-called "merits of the application"
24 and we realize we have a statutory duty to consider the
25 adequacy of the EA and I think you will find in the

1 past that that has been interpreted in a more liberal
2 fashion rather than a very narrow fashion to enable the
3 Board to get to the second decision; which is, whether
4 or not it should proceed and, if so, with or without
5 conditions. I think what this decision is speaking to
6 is essentially in a way the same idea.

7 MS. MURPHY: Mm-hmm. What you are
8 pointing out, Mr. Chairman, is that the way the
9 Environmental Assessment Act in Ontario is interpreted
10 is to look at the substance of the matters being dealt
11 with in the substance of the evidence. That is quite
12 different from the law that arises from the American
13 jurisdiction, the National Environmental Policy Act,
14 which proceeds on quite a different basis and I think
15 that is a very important distinction that you have
16 drawn and I think that's a very importance distinction
17 to keep in mind.

18 If I can take a minute just to take you
19 to that because Mr. Castrilli relies very heavily on
20 those decisions and he says that the Ontario
21 legislation is somehow based on the American statute
22 and he refers to all of these as being Environmental
23 Assessment Act decisions and I think it's very
24 important to keep in mind that they are extremely
25 different and that there are good reasons for that, but

1 that you can't rely on, for the procedural adequacy
2 parts of the discussion, on the U.S. cases. They just
3 don't apply.

4 As I was explaining when I was talking
5 about that yesterday and I was saying that the two very
6 important distinctions between our legislation in
7 Ontario and the federal environmental legislation in
8 the United States is that the person who does the
9 environmental assessment and the person who decides
10 whether the proceeding or the undertaking should carry
11 on are the same person and, because of that, the court
12 there takes a very rigorous look at whether the person
13 has met, to an objective standard, each of the things
14 they have to do before they can go into their
15 undertaking because they are making the decision
16 themselves.

17 And the cases that are cited explain in
18 fact that the National Environmental Policy Act in the
19 United States and the way it is interpreted in the
20 court is essentially a procedural statute. That's very
21 important. And instead of taking you to them, I can
22 tell you that there's a comment that explains that in
23 Calvert Cliffs at page 1112.

24 THE CHAIRMAN: Sorry, that page number
25 again?

1 MS. MURPHY: Page 1112. It's in Mr.
2 Castrilli's authorities at Tab 17. The court there --
3 excuse me. The court there basically says - you don't
4 need to go to, it's very short:

5 "However, the Act also contains very
6 important procedural provisions,
7 provisions which are designed to see that
8 all federal agencies do in fact exercise
9 the substantive discretion given them.
10 These provisions are not highly flexible,
11 indeed they establish a strict standard
12 of compliance."

13 They are explaining how they interpret
14 that law. And there's a similar comment which I will
15 just advise you is in the Bergland case at page 922,
16 that's Tab 18 of his authorities.

17 And instead of going to it, I will just
18 tell you - it's very short - where that court is
19 explaining again and they say:

20 "The Ninth Circuit has declared that
21 NEPA is essentially a procedural statute,
22 its purpose is to assure that by
23 following the procedures it prescribes,
24 agencies will be fully aware of the
25 impact of their decisions when they make

1 them. The question then is whether an
2 'agency has observed the procedures
3 required by law."

4 And that is really what they are looking
5 at in those cases and that is really an important
6 decision.

7 Now, as Mr. Castrilli pointed out, I have
8 also provided two other cases - he spoke to one of
9 them - in my case book and I have referenced them in my
10 factum. He says I conveniently provided him with
11 Stein.

12 Let me explain to you why those cases are
13 there. When one looks at the general comment in those
14 cases in the headnotes or whatever, one would assume
15 from looking at them that those cases go against me,
16 that those cases say something different from what I am
17 saying and, that being the case, it's my responsibility
18 to bring those cases to your attention and to advise
19 you why those cases are different from the case we are
20 looking at today. So that is why those cases are
21 provided.

22 And basically let me just give you a
23 short description of what they are about. In Stein,
24 which is dealing with the City of Winnipeg, what was
25 happening was that Mrs. Stein was concerned about the

1 spraying of a canker worms (They are little green worms
2 that bothered me when I was going to school in Winnipeg
3 as a child).

4 Mrs. Stein was concerned about that and
5 what had happened was that the City of Winnipeg is
6 governed by the City of Winnipeg Act, an Act of the
7 Legislature of Manitoba and that legislation sets out
8 that where the City is going to make a certain kind of
9 decision to do a work, it is required to do an
10 environmental assessment before it makes its decision.

11 So the point is that that is exactly the
12 same kind of situation -- exactly the same kind of
13 environmental assessment law that applied to the City
14 of Winnipeg as the U.S. law and, as a matter of fact,
15 in the dissent Mr. Justice Freedman in dissent explains
16 at page 486. He's discussing this particular
17 provision.

18 If you look to the -- I don't know if you
19 need to go to it, but it's at Tab 8 of my authorities,
20 and at page 486 his Lordship is saying, in the middle
21 of the middle paragraph where it says:

22 "In that connection, the legislature..."

23 Can you find that? He's discussing the
24 words of that particular statute.

25 THE CHAIRMAN: All right.

1 MS. MURPHY: Are you having trouble
2 locating it?

3 THE CHAIRMAN: It's all right.

4 MS. MURPHY: Basically what his Lordship
5 is doing is describing the statute and describing the
6 requirements on Committee to do an environmental
7 assessment before it makes its own decision.

8 And perhaps it's best to just look at the
9 entire paragraph to put it in context. His Lordship
10 says:

11 "Moreover there is enough evidence before
12 the court to indicate that methoxychlor
13 spraying 'may significantly affect the
14 quality of the human environment.'

15 Here it is worth noting that Section
16 6(5)(3)(1) ---"

17 That is a section in the City of Winnipeg Act:

18 "...comes into play even if a proposal
19 may have the effect in question. It's
20 not incumbent on a Plaintiff to show the
21 proposal necessarily will have that
22 effect. In that connection the
23 legislature..."

24 That's the Legislature of Manitoba:

25 "...has imposed on Plaintiffs a less

1 stringent burden than that which rests on
2 their American counterparts acting under
3 Section 102(c) of the National
4 Environmental Policy Act (NEPA).

5 That section, as Mr. Scarf has pointed
6 out, was the genesis of Section
7 6(5)(3)(1) of the City of Winnipeg Act."

8 He's just pointing out that the legislation that deals
9 with the City of Winnipeg is drawn from in fact - with
10 the some changes by the Legislature of Manitoba - the
11 U.S. situation and that that's the same kind of
12 situation.

13 His Lordship in dissent says that relying
14 on U.S. cases, because the City did not do that
15 environmental assessment, that his view was that the
16 City then could not carry out the undertaking because
17 they hadn't followed the procedures.

18 I'm going to ask you in a few minutes to
19 go to the rest of the case for another proposition.
20 But this was a situation where Mrs. Stein had brought
21 an action against the City saying that they had not
22 complied with that legislation and then brought an
23 injunction. What she was trying to do was get an order
24 for them to immediately stop before -- so that she
25 didn't have to wait to actually bring her action.

1 This decision is about the injunction.

2 In dissent Mr. Justice Freedman says: I think she's
3 right, she should get her injunction. The majority for
4 other reasons does not give her the injunction,
5 although they don't differ with him on the import of
6 the law.

7 And the other case I have cited which is
8 a very recent case --

9 THE CHAIRMAN: So what's the distinction
10 in that case, just so I have got it straight in my
11 mind. The City did not prepare the assessment.

12 MS. MURPHY: That's right.

13 THE CHAIRMAN: And so there the argument
14 was, is that the American cases should not apply?

15 MS. MURPHY: Right.

16 THE CHAIRMAN: Because in the U.S. it's
17 the proponent--

18 MS. MURPHY: No.

19 THE CHAIRMAN: Or the agency that
20 prepares the assessment; is that correct?

21 MS. MURPHY: No. Okay, maybe I better
22 clarify. The law in Manitoba with respect to the City
23 of Winnipeg is exactly the same as the NEPA law and so
24 what is happening here was that the City had
25 legislation that said when it was going to do something

1 it had to do an environmental assessment in such a way
2 before it carried out its work.

3 At the same time - perhaps maybe I should
4 tell you the rest of the facts - at same time, because
5 the work that was being carried out was spraying, the
6 City also had to obtain a licence and in order to
7 obtain a licence or permit for spraying in Manitoba at
8 that time, they went to a different agency, the Clean
9 Environment Commission and they did that. They went to
10 the Clean Environment Commission and got their licence
11 after hearing in fact.

12 So what was happening here was the City
13 had two things it had to do; it had to get its licence
14 and then what Mrs. Stein was arguing: Well, it was
15 still a work, they still had to do an environmental
16 assessment.

17 So she went to the court and she said
18 they didn't do the environmental assessment, they
19 didn't meet the procedural requirements, therefore,
20 they can't carry out this undertaking. They are one of
21 those situations where the decision-making body is the
22 same as the body that does the assessment.

23 THE CHAIRMAN: Okay.

24 MS. MURPHY: Knowing that there's that
25 separate system, that they also had a licence, is going

1 to be important really for another point and I would
2 like to leave it because I think the case is also
3 authority for another point. But it's just there
4 because on its face the case appears to say: If you
5 don't, you know, follow the procedures, you're out of
6 court. And, in fact, when you look at the case I would
7 suggest that it doesn't stand for that proposition but
8 that's why I am bringing it to your attention.

9 And the second one for the same reason
10 essentially that I'm bringing to your attention is
11 another bearing new case. This one was released April
12 10th, 1989, Canadian Wildlife Federation and the
13 Minister of the Environment -- this is the federal
14 Minister of the Environment.

15 THE CHAIRMAN: That is the Rafferty Dam
16 case; isn't it?

17 MS. MURPHY: That's the one. As you know
18 that is very new and has caused some consternation.

19 THE CHAIRMAN: It's been appealed.

20 MS. MURPHY: Yes. Yes, I am sure it has,
21 but it's interesting because there are a couple of
22 things in here as well that I would like to draw your
23 attention to. But the main one for this point is that
24 the federal regulatory process in Canada also bears
25 significant similarities to the NEPA statute in the

1 United States. That is, again it's a situation where
2 the person who is making the decision - in this case it
3 was the Minister of the Environment as a matter of
4 fact - is responsible to carry out an environmental
5 assessment before making the decision. So it's the
6 same kind of situation as the American cases as
7 distinct from the Ontario statute.

8 That was a case where there was an
9 organization, a government organization in Saskatchewan
10 that was building a dam or intending to building a dam,
11 of course they haven't got that far, and what that
12 organization had to do was an environmental assessment
13 in the province.

14 So the group did an environmental
15 assessment of the impact of that project in
16 Saskatchewan and got approval in Saskatchewan. Now,
17 the river in question went out of Saskatchewan with and
18 through Nova Scotia - Nova Scotia, no - through North
19 Dakota and into Manitoba, the Souris River System.
20 That meant it was an international river, so that in
21 order to build the dam the people who were going to
22 build the dam had to get a licence from the Federal
23 Minister of the Environment, that is because it was an
24 international river.

25 So the Federal Minister of the

1 Environment gave them their licence and the Canadian
2 Wildlife Service brought an application to the court
3 and said this Minister didn't have the right to do
4 that, to give that licence because he hadn't conducted
5 an environmental assessment under the Federal
6 Environmental Assessment process and, therefore, he had
7 not met the requirements and that the licence then was
8 vacated.

9 The Minister, of course, disagreed with
10 that position and the Minister said: Well, they have
11 done an environmental assessment in Saskatchewan. It's
12 pretty much the same kind of thing, I should be able to
13 rely on that.

14 THE CHAIRMAN: But didn't the case, Ms.
15 Murphy, really turn on the interpretation by Mr.
16 Justice Cullen that the 1984 Guidelines Order had the
17 effect of a regulation?

18 MS. MURPHY: Well, yes, and he does make
19 that decision.

20 THE CHAIRMAN: And, therefore, it had the
21 status of law and the government in effect ignored
22 their own regulation?

23 MS. MURPHY: That's right.

24 THE CHAIRMAN: And issued certiori as a
25 result.

1 MS. MURPHY: That's right. What he is
2 saying is, on the assumption that you treat that
3 guideline as a law the way you would the City of
4 Winnipeg Act or the way you would, you know, the
5 American legislation or the Environmental Assessment
6 Act, on the assumption that you treat it like that,
7 then you must meet procedural compliance and ultimately
8 follow those steps. That's correct.

9 And based on his interpretation, which is
10 one of those -- again, one of those situations if he's
11 right, that it's the decision-maker who must do these
12 things before making a decision. He's simply saying
13 you can't make the decision, you have no jurisdiction
14 to make that decision if you don't follow the steps
15 again, there is something else in that
16 case I think is interesting but I will take you back to
17 it in a few minutes. That is essentially why those
18 cases are cited to you.

19 THE CHAIRMAN: Well, I think the story
20 isn't finally told yet because I understand an action
21 has been commencing in the Old Man River Dam case in
22 Alberta on the same basis of the Rafferty Dam case
23 which is now going to be before the courts there and
24 who knows where it will all end up.

25 MS. MURPHY: Correct. In any event, it's

1 our view that the American law that has been cited to
2 you and the Canadian law that looks similar is not
3 relevant to the way one should interpret the Ontario
4 Environmental Assessment Act because to do that would
5 suggest that a proponent must follow a set of
6 procedural requirements, meet a set of procedural
7 requirements before giving jurisdiction to an
8 independent decision-maker and that that's not logical.

9 That the correct interpretation in
10 Ontario, we suggest, is that the Board must hear all
11 evidence and then assess the sufficiency of the
12 evidence as a matter of substance not as a matter of
13 procedure.

14 And all of that really is there to say,
15 unless this Board is treated like decision-makers in
16 that other kind of situation, it has no positive duty
17 to ensure -- it has no positive duty to ensure
18 sufficiency of the evidence. That being the case, it's
19 got to be left in the hands of the parties to do that.
20 The Board would not order parties -- individual parties
21 in their own case to present a witness to provide
22 information without a very good reason. It would have
23 to be a reason of that nature.

24 Now, as we say, in order to be
25 successful, we suggest that Mr. Castrilli would also

1 have to be successful in convincing you today that
2 there is no evidence being called. If you go over to
3 my page 23 - and again, I don't need to repeat it - but
4 as you asked me earlier, it's our view that proponents
5 who write environmental assessments should be able to
6 rely, at least in first instance, on the regulatory
7 processes in place that deal with their activities and
8 that they shouldn't be required to duplicate and that
9 in fact it's reasonable and admissible and permissible
10 to rely on the those regulatory processes.

11 THE CHAIRMAN: But do you not feel that
12 the other regulatory processes should bear some
13 resemblance to the process before the tribunal having
14 the concurrent jurisdiction. In other words, if the
15 other regulatory process did not have provision for
16 public hearing, public input, a procedural mechanism
17 for critical evaluation of the data put before the
18 other regulatory authority prior to its making a
19 decision or issuing a licence, is it not your position,
20 or is it your position that if a proponent is entitled
21 to rely on the decision of the other regulatory
22 authority, it is nevertheless within the jurisdiction
23 of this Board to at least ensure that the process
24 underlying that other decision was, in its view,
25 reasonable or offered some degree of -- some basis upon

1 which this Board making the decision could also feel
2 comfortable relying on the decision of the other
3 authority?

4 MS. MURPHY: I think first of all that it
5 isn't necessary for the other decision-maker to be
6 following exactly the same process as the process
7 followed by this decision-maker.

8 THE CHAIRMAN: No, not the same process,
9 but a reasonable process, one that gives this Board
10 making the decision relying on the decision of the
11 other authority, confidence that that other decision
12 was made on a reasonable basis on sufficient data to
13 enable that other authority to come to an appropriate
14 decision.

15 MS. MURPHY: It's reasonable for the
16 Board to be interested in how the other process works
17 and certainly it's in our best interest to convince you
18 that it's reasonable for us to rely on it.

19 THE CHAIRMAN: And us.

20 MS. MURPHY: And you of course, but we
21 are relying on it. That's the point, we are relying on
22 it, we have to convince you that it's reasonable to be
23 relied upon. Let me put it that way.

24 And you certainly may be -- that
25 doesn't -- all right. The first point is this though:

1 That you have to, in my respectful view, take
2 cognizance that it exists. All right, it's not
3 something that let's say is irrelevant, it isn't
4 something that you put aside entirely and say start all
5 over again. That's point No. 1, it is relevant.

6 Certainly you will want to explore how it
7 works and certainly the information you get about how
8 it works will affect the weight you put ultimately on
9 the results of that process. I think that is the best
10 way I can put it.

11 But taking the existence of that other
12 decision-maker into consideration as a matter of fact
13 is not only acceptable and possible for you but it's
14 done commonly and, in fact, if it wasn't done, one
15 would have to start from square one every time on every
16 issue and certainly that is not the intention in
17 administering this legislation to require everything
18 that is subject to a regulatory process to be proved
19 over again, certainly that's not the intention.

20 So that the evidence of that -- the
21 existence of that body and other regulatory
22 decision-making is certainly evidence and that it's
23 evidence that has probative value, it has some weight.

24 So that the point is really, there's two
25 ends to the spectrum. You are advised that this

1 process exists. Now, on the one hand one might argue
2 that the fact that it exists is something you should
3 not consider. All right. If someone is going to argue
4 that, what they are doing is saying: You are
5 delegating your authority by considering it at all.

6 In our respectful view, that's wrong,
7 considering it is not a delegation of your authority,
8 taking it into consideration is something that you are
9 certainly able to do.

10 On the other hand, one would also be
11 wrong in law, in our respectful view, if we said you
12 have to consider that and nothing else. We are not
13 suggesting that, that you have to just take it as a
14 given. That also would be wrong and we are not making
15 that argument.

16 But we are saying that acknowledging the
17 legislative framework in place in Canada and Ontario
18 and acknowledging that the review under that
19 legislation exists, has probative value, that that's
20 not a delegation of your decision-making authority and
21 that at this point in time, once the evidence is in -
22 which, of course, it isn't right now - but once the
23 evidence is in and has been subject to
24 cross-examination, that it is prima facie evidence of
25 the facts set out therein.

1 THE CHAIRMAN: Okay, Ms. Murphy. Isn't
2 the crux of the question that, if you take the position
3 that a licence has been issued or a regulatory approval
4 has been given by another body based on certain studies
5 which has led the other body to conclude that the
6 impacts arising from the use of the pesticides do not
7 have an adverse effect on human health, the presumption
8 is that's why the licence or approval was given, that
9 you rely on that fact in terms of your complying with
10 Section 5(3). But in doing so, the question before us
11 is: There is apparently going to be no evidence as to
12 the basis upon which the other authorities arrived at
13 that conclusion, and that is what the intervenors, Mr.
14 Castrilli, is in effect asking for, evidence before
15 this tribunal which really formed the basis of the
16 other regulatory authorities' conclusions.

17 And I guess the question is: Are you
18 obliged in complying with the requirements of Section
19 5(3) in this application to go beyond putting in
20 conclusions reached elsewhere without identifying and
21 putting into evidence the basis upon which those
22 conclusions elsewhere were reached?

23 MS. MURPHY: Okay. The first point is,
24 you have said that what Mr. Castrilli is asking for is
25 the basis upon which those other people make their

1 decisions. He hasn't told me that.

2 THE CHAIRMAN: Well, okay. Perhaps
3 that's not what he is asking for, but --

4 MS. MURPHY: That's one of my problems.

5 THE CHAIRMAN: But it appears to the
6 Board that what part of the complaint is, is that there
7 is an indication from the witness statements filed by
8 MNR that no evidence is going to be put in in terms of
9 studies and other things that may have been done in
10 order to convince the other regulatory authorities to
11 issue the licence or the approval.

12 MS. MURPHY: That's true. Our judgment
13 at this point in time - and when I get to the end of
14 this I would like to explain to you how we arrived at
15 that, that's what I explained at the beginning - but
16 our judgment at this point in time, first of all, is
17 that that's true, we think that what we have to do is
18 show to you that there is a process, explain to you how
19 it works and attempt to convince you that it is
20 reasonable to rely on that process.

21 THE CHAIRMAN: Without going into any of
22 the underlying basis for that other decision
23 essentially?

24 MS. MURPHY: Essentially that's right.
25 Because if we are obliged to do that - and there is

1 more than one reason for that and, as I say, I would
2 like to speak to that in more detail, there is more
3 than one reason for that - but the point is, that if
4 one is obliged to do that, then in an environmental
5 assessment one is obliged to go behind all of the
6 regulations that exist, all the regulatory schemes that
7 exist that have some effect on your undertaking and
8 reprove that that was reasonable.

9 If you are doing a building, you would
10 have to reprove the reasonableness of the Ontario
11 building code. It just goes on. I can give you dozens
12 of examples, but it is our view that the Ontario
13 Environmental Assessment Act was not intended for this
14 Board to go back and re-evaluate all of the decisions
15 and the basis upon which all of the decisions of other
16 regulatory bodies have been made.

17 THE CHAIRMAN: Okay. And that's the
18 position of the proponent.

19 MS. MURPHY: Correct.

20 THE CHAIRMAN: Now, you are also taking
21 the position, though, that another party could call
22 evidence to show, in their view, that the basis for the
23 other regulatory's decision was unreasonable?

24 MS. MURPHY: Yes, I think that's true.
25 See, my problem is this: That what I have to do is

1 answer the question: Would the other party ever be
2 able to lead evidence before you that was relevant.
3 And my answer to that has got to be yes.

4 Now, whether any specific evidence that
5 person wants to lead, you know, is relevant or has any
6 bearing or whatever, we can't assess until we know what
7 it is. But I have to look at it in the broadest sense
8 and say: Is it possible that other parties would lead
9 evidence that's relevant to those issues. And the
10 answer has got to be yes.

11 THE CHAIRMAN: And if another party
12 brought in a study, as an example, or called a witness
13 to say that this study was used by the other regulatory
14 authority and was a principal study upon which they
15 based their conclusions, and yet our evidence is that
16 this study should not have been relied on--

17 MS. MURPHY: Mm-hmm.

18 THE CHAIRMAN: --in that fashion in
19 giving whatever reasons are given, then you would
20 respond to that at the appropriate time?

21 MS. MURPHY: Oh, yes.

22 THE CHAIRMAN: Either through
23 cross-examination or--

24 MS. MURPHY: There would be
25 cross-examination.

1 THE CHAIRMAN: --or, if necessary,
2 calling reply evidence?

3 MS. MURPHY: Right. I think -- I am not
4 being facetious here, really. I think it's important
5 to keep in mind that if someone came here and said: I
6 can prove to you that on the day the Minister signed
7 the thing saying "x", "y", "z" was okay he was dead
8 drunk, it may well be that our response would be, maybe
9 we shouldn't rely on that either.

10 You know, I mean you have to keep in mind
11 that there is some good faith in this exercise and that
12 we are interested.

13 I'm going to be going on to another point
14 and it is about 10:30,, would you like to take a break
15 now?

16 THE CHAIRMAN: Sure,, we will take a
17 break for about 20 minutes.

18 ---Recess taken at 10:30 a.m.

19 ---On resuming at 11:00 a.m.

20 THE CHAIRMAN: Thank you. Be seated,
21 please.

22 MS. SWENARCHUK: Mr. Chairman, I just
23 wanted to remind everyone that we do have a
24 clearcutting procedures meeting scheduled for 12:30, if
25 that would be a good time for the Board to break.

1 THE CHAIRMAN: Very well.

2 MS. MURPHY: I expect to be finished long
3 before then.

4 THE CHAIRMAN: Do you have any idea how
5 long you might be, Mr. Castrilli?

6 MR. CASTRILLI: Mr. Chairman, I would
7 anticipate at this point about an hour to an hour and a
8 half.

9 THE CHAIRMAN: Okay.

10 MS. MURPHY: I'm going to try to be less
11 than 20 minutes.

12 We were discussing the concept of a
13 decision-maker in this kind of situation taking
14 cognizance of the decisions and so forth of other
15 decision-makers. There are numerous examples of that
16 happening and I just wanted to bring a few -- I wanted
17 to bring one in particular to your attention and then
18 advise that there are others in the materials that you
19 could look at.

20 But the main one that I would like to
21 bring to your attention is in Mr. Castrilli's
22 authorities, the Canadian Earthcare Society - and I am
23 not going to ask you to go to the case - but the point
24 there is that what was happening in that case was that
25 in British Columbia, the system in the province that

1 deals with licensing pesticide applications is similar
2 to the Ontario Ministry of the Environment's system,
3 has a permit system as well in the province.

4 Now, as I understand it, their
5 legislation is slightly different from the Ontario
6 legislation in that, in certain circumstances where
7 some someone applies for a permit, there can be a
8 hearing. And, in that case, in the Canadian Earthcare
9 Society case, what had originally happened was that the
10 Ministry of Forests in B.C. had applied for such a
11 permit and that there was a hearing and in opposition
12 was the Canadian Earthcare Society.

13 The case was argued before the
14 Environmental Appeal Board - that's the Board that
15 makes decisions on that matter - it was then appealed
16 to, like, the Supreme Court and then ultimately
17 appealed to the B.C. Court of Appeal.

18 The British Columbia -- what originally
19 happened was that the Environmental Appeal Board had
20 decided, first of all, that they could accept the
21 evidence of the Canadian regulatory system as good
22 evidence that human health was generally covered by the
23 legislation.

24 They also were asked at first instance to
25 consider alternatives to the use of pesticides, and

1 basically what had happened was that the original Board
2 had said that they weren't going to consider any further
3 than relying on the federal legislation the health
4 aspects. And they also went on to say that they
5 wouldn't listen to evidence on alternatives on the
6 basis that there was no unreasonable negative effect,
7 and that was appealed and ultimately appealed to the
8 Court of Appeal.

9 First of all -- so there are really two
10 issues and I set them out on my page 28, paragraph 66.
11 So that the point is that in Canadian Earthcare Society
12 the B.C. Court of Appeal is looking at two issues.
13 First, they considered whether the Environmental Appeal
14 Board committed a jurisdictional error in refusing to
15 hear evidence on toxicology or in assuming that a
16 federally registered pesticide was generally safe. The
17 second issue was whether the Board erred in refusing to
18 assess evidence of silvicultural practices or
19 alternative methods of treatment.

20 In the Court of Appeal, the court
21 accepting the lower court judge said -- agreed with him
22 when he said:

23 "Common sense dictates that the fact
24 that a federally registered pesticide
25 has undergone extensive testing must have

1 probative value. I have concluded that
2 the Board did not commit a jurisdictional
3 error by assuming the federally
4 registered pesticide to be generally
5 safe."

6 The judge in chambers went on to say that
7 the Board did in fact hear evidence on relevant
8 toxicity matters in that case because they looked at
9 whether that particular application would have other
10 difficulties.

11 If you go over the page to page 69 - and
12 this is important and I would like to bring this to
13 your attention -- or rather, paragraph 69, the court
14 also looked to the second issue and the Court of Appeal
15 held that, in that case, there was evidence before the
16 Environmental Appeal Board that some adverse effect to
17 wildlife habitat was possible. It appeared on the
18 record that there was some potential effect and, in
19 that case, they said that the Environmental Appeal
20 Board should have considered evidence about alternative
21 treatment methods and silvicultural practices in order
22 to assess the reasonableness of the potential adverse
23 effect.

24 So they were looking at the other part of
25 it and saying: It seems to us that you shouldn't have

1 stopped people from talking about that part. And it
2 was interesting because this case only recently came to
3 our attention, that what the Court of Appeal in B.C. is
4 saying is pretty much, you know, square with the way we
5 are approaching this matter ourselves.

6 It is our view that we can rely on the
7 federal regulatory process to, on its face, deal with
8 human health effects. Not to be facetious about it,
9 Mr. Chairman, these products are not intended to be
10 applied to human beings, however --

11 THE CHAIRMAN: In this case, are you
12 aware of whether or not intervenors or opposition to
13 the proponent wanted to introduce evidence of their
14 own?

15 MS. MURPHY: They did, they introduced
16 evidence of their own.

17 THE CHAIRMAN: So there wasn't -- as I
18 understand what you have said, there was consideration
19 at one point by the Appeal Board not to allow that
20 evidence in, they ultimately let in it.

21 MS. MURPHY: Actually, I think it's
22 probably best if you look back to page 28 because the
23 judge in chambers does make reference to that.

24 THE CHAIRMAN: Okay.

25 MS. MURPHY: The part that I have set out

1 in there. I read you the first part that talks about
2 the federal interrogatory regulatory system and he
3 adds:

4 "It is important to bear in mind that the
5 Board did not state that a federally
6 registered pesticide could never cause an
7 unreasonable adverse effect. The Board
8 was willing to hear evidence on
9 toxicity to the extent that the evidence
10 show that the specific site in
11 question prevented safe application of
12 the pesticide."

13 There they are looking at a specific site
14 and they did say: We will hear evidence on that, we
15 don't want to hear general evidence - and I don't know
16 whether there was even -- I see your question now. I
17 don't know whether there was a request.

18 THE CHAIRMAN: What do you do in a case
19 like we have before us where you are not dealing with a
20 specific site; where you're dealing with a specific
21 site?

22 MS. MURPHY: Well, I think that is
23 important in this case because what we are doing is we
24 are saying, this is a class environmental assessment,
25 we are talking about general principles that will apply

1 across the area of the undertaking, and we are also
2 saying that specific projects -- we are going to be
3 talking to you about how specific projects are dealt
4 with in the planning and licensing scheme.

5 And I think that does bear some -- that
6 does bear some weight when we look at what the relevant
7 evidence would be that others want to lead, for
8 example. The difficulty is making some kind of
9 assessment in the air about whether particular evidence
10 is relevant to the Class Environmental Assessment is
11 difficult without knowing what it would be. I think it
12 will be a relevant consideration.

13 THE CHAIRMAN: Okay.

14 MS. MURPHY: I was explaining that it is
15 important I think to bear in mind that these products
16 that we are talking about, the herbicides and the
17 insecticides, are intended to be applied to plants and
18 bugs, that that's what they are for. You wouldn't buy
19 a herbicide and apply it until you intended to have an
20 effect.

21 And so for that reason we said: We'd
22 better go farther with that part and look at those
23 effects, and we have done that in our evidence.

24 THE CHAIRMAN: But surely the concern of
25 this Board would be that notwithstanding that there

1 might be an adverse effect to plants and animals, if in
2 fact there was going to be an adverse effect to human
3 beings, that is something we should definitely be
4 concerned with as well.

5 MS. MURPHY: Mm-hmm, that's right. But
6 what we are advising you at this point in time is that
7 our judgment now is that what we will do is rely and
8 give you information about and let people cross-examine
9 on the process that deals with that matter, and we will
10 also be leading further evidence on how the Ministry of
11 Natural Resources adds even further processes to deal
12 with that matter. And I think you have to think about
13 all of those things.

14 I am just saying that we have added some
15 information on the wildlife side because that's where
16 the direct effects are intended to be. But the point
17 is that: Yes, indeed, we rely on that system and we
18 think it is fair to do that at this point in time and
19 we think we would have to explain that to you and show
20 you in our evidence why we do and that it's reasonable.

21 If you go over the page to page 30 - I
22 think you are at page 29 now, I can't recall - page 30.
23 This really sets out what we had originally advised
24 people in our statement of evidence, that this is the
25 evidence that we are going to be dealing with: Are the

1 products registered and authorized for use, are they
2 use in compliance, what are the additional procedures
3 imposed by the Ministry of Natural Resources, and what
4 are reasonable alternatives to the use of the products,
5 and in what circumstances are they used, and what
6 factors influence the choice.

7 I think we really should keep in mind
8 that what we are doing here today, what we are here
9 today to deal with is whether the Board has
10 jurisdiction to compel further evidence at this point
11 in time or perhaps ever. But I think the point is that
12 at this point in time you have not heard the evidence,
13 you have not heard the cross-examination, and I urge
14 you to pay close attention to that and also to pay
15 close attention to the fact that we have advised that
16 this is our position and that we think it is a
17 reasonable one.

18 There are a number of things -- as Mr.
19 Campbell explained, there are a number of things that
20 can come from that. If I can just take one minute.

21 One thing I did want -- I wanted to speak
22 to...

23 THE CHAIRMAN: Excuse us one moment.

24 MS. MURPHY: Mm-hmm.

25 ---Discussion off the record

1 THE CHAIRMAN: Excuse us, Ms. Murphy.
2 Continue.

3 MS. MURPHY: I was advising that the
4 Ministry relies on that regulatory process. I think it
5 is encumbent upon me at this point to make it perfectly
6 clear, because I think this is something that arose in
7 Mr. Castrilli's argument, and that I think really is
8 encumbent upon us to really clarify for you.

9 Mr. Castrilli suggested that we are
10 asking for this Board to approve the products and that
11 is not true, we are not asking this Board to approve
12 the use of specific products.

13 Mr. Castrilli characterized this as being
14 the third doughnut. He was saying that a person
15 essentially - I don't have his words - but the idea was
16 that a product would have to now be registered
17 federally, dealt with also by the Ministry of the
18 Environment specifically and that, in addition, this is
19 a third hoop for these products and it is suggesting
20 that this Board was being asked to give specific
21 approval for the use of specific products. And I think
22 I better make it clear to you that that's not case.

23 THE CHAIRMAN: Would it be open to the
24 Board to specifically disapprove the use of a specific
25 product in your view?

1 MS. MURPHY: If I can just take a moment.

2 THE CHAIRMAN: In other words, if the
3 intervenors brought in evidence to say that
4 notwithstanding the federal registration, we have
5 evidence to indicate that this product is likely to be
6 unsafe, say, in terms of effects on both humans or, for
7 that matter, plants and animals and, therefore, as a
8 consequence, Board, in dealing with the application as
9 a whole you should be putting in a condition that the
10 Ministry shall not be permitted to use such and such a
11 product in the course of its activities and, in that
12 instance, will have to go to some alternative other
13 than the use of that product, it might be another
14 product or it might be something altogether that isn't
15 a pesticide.

16 Would that be open to the Board in your
17 view?

18 MS. MURPHY: I think -- to use the words
19 of my friend Mr. Campbell, I think the Board would have
20 to be very cautious in doing something of that nature.

21 THE CHAIRMAN: Well, the Board would
22 always be cautious in any event.

23 MS. MURPHY: That I think in theory if
24 the preponderance - I mean, it would have to be very
25 strong evidence - and if in theory there was very

1 strong evidence before you, it is not totally
2 impossible because certainly these regulatory processes
3 go this way. So I am not suggesting that that's
4 totally impossible, no.

5 THE CHAIRMAN: One only has to think back
6 as far as the Alacor case.

7 MS. MURPHY: Which, by the way, it took a
8 significant length of time before a Board, and that's
9 the other point I would like to make.

10 THE CHAIRMAN: No, but that was a case I
11 think where there was an example that there were
12 registrations rendered, both here and the United
13 States, but subsequent evidence convinced the tribunal
14 and ultimately the Minister to take a particular course
15 of action.

16 MS. MURPHY: Right. That was a tribunal,
17 as I recall, that was actually -- that actually dealt
18 with it inside this process that we are talking about.
19 That's an important point.

20 There are a couple of things about this
21 that you should know and that -- you see, I am a bit
22 concerned about putting some of this to you because I
23 can't give you evidence and that this is something that
24 you have to keep in mind. When I am talking to you, I
25 am telling you generally what the evidence will be and

1 I am giving argument, but I can't give you evidence and
2 neither can Mr. Castrilli of course.

3 But you have to keep in mind that while
4 there are -- as Mr. Castrilli advises, there's
5 discussion about nine products, the way the system
6 works...

7 THE CHAIRMAN: Bear in mind that we have
8 read the witness statements--

9 MS. MURPHY: Fine. So that you
10 understand --

11 THE CHAIRMAN: --to prepare for the
12 scoping session that will come this afternoon.

13 MS. MURPHY: Okay. So that you
14 understand that there are individual registrations in
15 the neighbourhood of 30 to 40 individual registrations
16 with respect to these particular products.

17 I don't think the Board is really
18 interested in embarking in this hearing into going
19 through 30 or 40 product registrations to determine
20 whether they were reasonable. I don't think any of us
21 are interested in doing that.

22 THE CHAIRMAN: You can assume that that
23 is probably the case.

24 MS. MURPHY: So in result, it's our
25 submission that the Board does not have jurisdiction to

1 order us to call this evidence. In our submission, we
2 have made a reasonable judgment in deciding to rely on
3 federal and provincial regulatory process at this stage
4 and that you are going to have to hear the evidence
5 about it and about the additional steps that the
6 Ministry takes, and there are a number of things that
7 can happen.

8 Now, consistent with that we've advised
9 that we are willing to withdraw the Ritter paper, if
10 that is what Mr. Castrilli would like. We've advised
11 that we don't rely on it at this time and we had no --
12 it was, as you can see from the face of it, provided on
13 the four information bases.

14 And just before I finish, I had a
15 question that -- or you had a question I thought I
16 wanted to deal with. Mr. Chairman, yesterday you were
17 asking someone about a federal case that dealt with the
18 ability to speak to terms and conditions.

19 THE CHAIRMAN: Yes.

20 MS. MURPHY: And I wasn't entirely sure,
21 I think you were asking Mr. Campbell about that and, as
22 I recall, you were saying something about that case --
23 I haven't seen the case, but that case stands for the
24 proposition that all parties may speak to the subject.

25 THE CHAIRMAN: It was a case where the

1 tribunal decided to impose certain conditions of
2 approval that were not raised during the course of the
3 hearing, were not discussed in any way and, if I recall
4 the decision - unfortunately we have the citation
5 somewhere but I can't recall it at the moment - the
6 court held that parties should be entitled to also
7 speak to conditions of approval and since they hadn't
8 had that opportunity, the court was going to, in
9 effect, give them that opportunity.

10 MS. MURPHY: So, as I understand it then,
11 the situation -- the similar situation here is that all
12 of us will speak to the suggestions for terms and
13 conditions and that the Board would take those into
14 account. I suppose that case stands for the
15 proposition that if the Board was to impose something
16 different from what was discussed, they should give
17 some kind of notice so people can make further
18 submissions.

19 THE CHAIRMAN: Basically that appears,
20 as I recall the case, to be what it stands for. It's
21 sort of a departure in the sense that quite often
22 conditions of approval in environmental assessment
23 processes are made outside of the hearing process.

24 For instance, prior to the Environmental
25 Assessment Board obtaining the decision-making power

1 under the Environmental Protection Act and Ontario
2 Water Resource Act applications, the director of
3 approvals at the Ministry often imposed a whole raft of
4 conditions in terms of issuing a certificate of
5 approval after the Board in a report had, for example,
6 recommended approval.

7 And that was a necessary aspect of
8 handling it in that fashion because you wouldn't have
9 things like final plans and specifications or final
10 design before the Board at the time of the hearing
11 itself, in effect, people wanted to get an approval in
12 principle and then go out and do the engineering to
13 bring it to the other stage and somebody else would
14 make the ultimate decision based on that extra
15 information.

16 What this federal case appeared to be
17 saying is, is that where conditions of approval are
18 being rendered -- are being imposed, rather, by a
19 decision-maker, parties should have an opportunity to
20 speak to those conditions.

21 MS. MURPHY: Fair enough. The comment I
22 was going to make about terms and conditions, you were
23 looking at all of the optional ways that this matter
24 could be dealt with at the end and certainly denial of
25 approval, approval, and you talked about severing and

1 so forth and one of the things you talked about was
2 terms and conditions, and we will be talking at more
3 length about terms and conditions over the rest of the
4 hearing, but I thought it would be wise to suggest,
5 certainly these matters are subjects that could be
6 dealt with in terms and conditions.

7 Because of the nature of this particular
8 application, a Class Environmental Assessment which, in
9 our submission, should last for a limited length of
10 time, our submission will be that the approval should
11 last for five years and then have a review of the
12 approval, a separate process for that.

13 THE CHAIRMAN: Are you suggesting another
14 Class EA inquiry of the same matter--

15 MS. MURPHY: I hope not.

16 THE CHAIRMAN: --at the end of five
17 years. We will be barely finished this one.

18 MS. MURPHY: I certainly hope not.
19 That's right. We are going to be making submissions
20 about what that might involve, but in looking at the
21 potential for terms and conditions I think what it
22 means to do is to ensure that the terms and conditions
23 of approval are quite clear on their face, that they
24 let people know exactly what is expected so that the
25 proponent knows what is expected and so that others

1 know what is expected and then have built in, if it's
2 going to be something of that nature, some kind of
3 reporting mechanism or reporting date so that people
4 can know when as well. Because, you are right, that
5 kind of thing can cause some difficulty and I think
6 those are some of the ways you can cope with that.

7 THE CHAIRMAN: Okay.

8 MS. MURPHY: In any event, as we have
9 said, we think it is our responsibility to convince you
10 that it's reasonable for us to rely on this process and
11 we are going to do our best to do that and we'd like
12 the opportunity to do that.

13 If you are uncomfortable, we would
14 certainly like to know; that is in our best interests,
15 and if you are uncomfortable, advise us and we will do
16 our best because, bear in mind, that is our
17 responsibility too.

18 And that's the end of my submissions,
19 unless you have questions.

20 MRS. KOVEN: Yes. There were two
21 statements you made yesterday for which I would like
22 some clarification.

23 The first one had to do with, something
24 to the point that your client was unable or wasn't
25 privy to the information that went into assessing

1 health effects before the federal registration process
2 was completed. And what did you mean by that?

3 MS. MURPHY: Well, actually the situation
4 as I understand it is this: When individuals are
5 required to provide information in this particular case
6 to the federal government, asking for approval under -
7 and this is similar to a lot of other kind of
8 legislation - but in this particular situation, you
9 have a regulatory body and that body has the right to
10 compel people to provide information to them. So
11 that's what's happening in that case.

12 It happens in all kinds of situations.
13 What happens in that case is that the federal
14 regulatory body says to the company that wants
15 registration: You are compelled to provide to us
16 certain information and it's very complicated, there's
17 all kinds of stuff they have to give.

18 Now, there's a dividing line as I -- well
19 in Ontario, you know, we deal with the same kind of
20 problem and there's a dividing line between the kinds
21 of information that are available subsequently to other
22 parties and there's other information that isn't and...

23 THE CHAIRMAN: What is it, of a
24 proprietary nature, is that the problem?

25 MS. MURPHY: Information of a proprietary

1 nature. Like I'm not all that familiar with the
2 Federal Freedom of Information Act, I'm much more
3 familiar with Ontario, but the argument apparently
4 revolves around information of a proprietary nature,
5 information dealing with trade secrets, things of that
6 nature.

7 So what happens is that the people who
8 provide that information provide it to that regulatory
9 body and they are saying they are providing it in
10 confidence, that they own the information and that
11 regular body doesn't and can't subsequently dealt with
12 it. Okay.

13 Now, that situation obtains in Ontario as
14 well for people in Ontario that do regulation. The
15 situation is that with respect to the specific kinds of
16 information we are talking, you asked me directly, Mr.
17 Chairman - I think it was you or Mr. Martel, I can't
18 recall - you asked, would we ever be able to have
19 before us all of the information that that federal body
20 used in coming to its decision. And my answer is, no,
21 we can't get that information from them, it's
22 proprietary information, as I understand, proprietary
23 information in their hands and they don't release it.

24 And I bring to your attention that that
25 is actually fairly well known and there's -- I have a

1 book here that deals with that or that speaks to that.

2 THE CHAIRMAN: Is that the Law Reform
3 Commission Order?

4 MS. MURPHY: That's right. The author was
5 Mr. Castrilli as a matter of fact. And he advises in
6 that book with some -- he criticizes the situation, but
7 he advises that --

8 THE CHAIRMAN: Can we buy a copy? That
9 one comes free; doesn't it, Mr. Castrilli?

10 MR. CASTRILLI: It's free, Mr. Chairman.

11 MS. MURPHY: He criticizes that situation
12 but he's advising that it exists. But, you see, this
13 is exactly why I have a little concern with him asking
14 for something because he can't possibly be asking you
15 to order us to do something that he knows we can't do.
16 So I find it difficult to understand what it is he's
17 asking you to order us to do.

18 So that's one question.

19 MRS. KOVEN: The expert assessment of
20 health effects underlying the registration process is
21 not made public in the decision that's given to the
22 registrant.

23 MS. MURPHY: I'm sorry.

24 MRS. KOVEN: An expert assessment of the
25 health effects is part of the registration process, and

1 when a decision is made not to approve, not to register
2 a product, then that decision is not given to the
3 company who is asking for registration?

4 MS. MURPHY: That's a different question.
5 You're asking whether the company that is refused
6 receives a reason for refusal?

7 MRS. KOVEN: Mm-hmm.

8 MS. MURPHY: Well, I assume they do. If
9 you look at Section 18 where it says:

10 "Where the Minister may refuse... "

11 I assume if it's a normal situation they
12 would have to give reasons to the company.

13 MRS. KOVEN: And then that decision can
14 be appealed?

15 MS. MURPHY: Oh. Well, no, if they
16 refused -- I don't know. We'd have to go back into the
17 legislation. This is the point, I think this is
18 information that would be available to you in the
19 evidence, but I don't have, you know, all of the
20 information here.

21 I think the hearing that is allowed for
22 is hearing in situations where there has been an
23 approval and the intention of the Minister to revoke.
24 I think the Minister has a right to refuse, I don't
25 think there's a hearing on the original situation where

1 person asks for approval.

2 THE CHAIRMAN: Where there is a hearing,
3 is it one of those situations where the parties have
4 to, to the hearing, have to undertake not to divulge
5 any of the information outside of the hearing and it's
6 I think an in-camera session.

7 MS. MURPHY: I know there is one case
8 that deals with whether this is a normal sort of
9 hearing situation and it's a Federal Court case and I
10 can't give you the citation, it's fairly recent,
11 dealing with whether that's a normal hearing situation.

12 And I think that case does say that the
13 person has a right to a normal hearing. Then whether
14 the information -- certain information would be heard
15 in-camera, I think would be determined at the hearing
16 on the basis of the submissions made by the parties.
17 That's always the case with that situation.

18 THE CHAIRMAN: Because I think our Act,
19 the Environmental Assessment Acts provides for
20 possibility of an in-camera portion of a hearing--

21 MS. MURPHY: Yes, that's common.

22 THE CHAIRMAN: --in cases where
23 proprietary evidence is before the Board.

24 MS. MURPHY: But even at common law I
25 would think that a person could argue in certain

1 circumstances before any tribunal that certain things,
2 even an environmental assessment for example; that is
3 available also in an environmental assessment, it's
4 also available in public inquiries, even situations
5 where you don't have an ultimate decision-maker, that
6 argument could be made to the Board.

7 MRS. KOVEN: The other statement you made
8 yesterday, you said that pesticides is an emotional
9 issue. What did you mean by that?

10 MS. MURPHY: Well, I think it's sort of
11 on it's face, it's in the newspapers, it's something we
12 are all concerned about, and I am just concerned and I
13 thought it was incumbent upon me to mention that I am
14 concerned that the issue itself, because people have a
15 high degree of concern, shouldn't inform to a great
16 degree the principles that are applied to the question
17 that we are dealing with.

18 MR. MARTEL: You said this morning that
19 the - I want to quote you properly too - that we didn't
20 use herbicides to -- we used them on bugs and animals.
21 But there have been accidents; have there not, where
22 humans in fact have been splashed badly?

23 MS. MURPHY: You will hear evidence about
24 that.

25 MR. MARTEL: Well, I have read the

1 evidence, I didn't see it.

2 MS. MURPHY: Well, you will hear evidence
3 about that.

4 MR. MARTEL: Fine.

5 MS. MURPHY: I understand that that is
6 something people are interested in. I learned that
7 from the scoping and we will be giving you some
8 evidence about that.

9 MR. MARTEL: All right. Fine, thank you

10 MS. MURPHY: In fact, it's almost time
11 for scoping.

12 THE CHAIRMAN: Thank you. Well, are you
13 ready to proceed?

14 MR. CASTRILLI: Yes, Mr. Chairman. If I
15 could have a moment to simply move my material over to
16 the podium.

17 THE CHAIRMAN: Very well. We might as
18 well proceed with you, Mr. Castrilli, right until close
19 to 12:30 and then we can break until two and that other
20 meeting can take place.

21 MR. CASTRILLI: Thank you, Mr. Chairman.

22 Let me begin by summarizing my responses
23 to the submissions of my friends and then dealing with
24 the specifics.

25 Firstly: To succeed on this motion I do

1 not have to show that a perfected document is a
2 pre-condition to assumption of jurisdiction by this
3 Board. It is rather a pre-condition to the Ministry of
4 Natural Resources obtaining an approval.

5 Secondly: From the submissions we've
6 heard in the last day and a half the question of no
7 evidence is still on the table. Ms. Murphy has raised
8 that in her factum, she's raised it in her oral
9 submissions, the issue has not gone away.

10 Thirdly: Argument about the existence of
11 other federal and provincial laws is not any evidence
12 whatsoever about the potential human health effects of
13 particular products.

14 Fourth: This Board is not precluded by
15 law from compelling the calling of witnesses, having
16 said that, the Ministry can call the witness of it's
17 choice, it's part of what the motion is about, and if
18 they want to call the father of 24-D it's entirely open
19 to them. But they are obligated, as a result of
20 Section 5(3), to meet its requirements.

21 And, fifthly: As we indicated yesterday,
22 we have no difficulty with the Board indicating now
23 that it is dissatisfied with the state of the evidence
24 that MNR proposes to adduce. Frankly, we believe the
25 process will be better served with the Board indicating

1 this now while there is time to still rectify the
2 problem, rather than later when there will be no time
3 to do so.

4 I think those basically five general
5 responses to the submissions of my friends. I want to
6 go into some detail on a number of things I have
7 indicated and, with your permission, I would like to
8 proceed in the order in which they gave their
9 submissions. And where possible, I will certainly try
10 to combine my comments that I am indicating to you I'm
11 responding to one, two or three of them.

12 THE CHAIRMAN: Very well.

13 MR. CASTRILLI: I'll begin with Mr.
14 Campbell.

15 I believe he said in response to a
16 question from the Board, and I believe the question
17 was: What can the Board do at this stage? And I
18 believe the options that were being raised by the Board
19 at that point were indicating uneasiness with the state
20 of the evidence, or granting our relief, or what have
21 you.

22 And my notes indicate that what Mr.
23 Campbell said in response was that the Board cannot
24 rule in a vacuum of evidence, or words to that effect,
25 and what I believe he was saying was that simply - and

1 he was really simply indicating that there is not yet
2 in fact before you any evidence formally on either
3 Panels 12 and 13. I think that is essentially what he
4 was driving at.

5 The problem with his response, Mr.
6 Chairman, is that it ignores that we do have the
7 Environmental Assessment Document, we do have the
8 witness statements, we do have the curriculum vitae of
9 the witnesses, and we do have the admissions of Ms.
10 Murphy in her factum and her oral submissions that the
11 nature of the evidence to be led will be evidence about
12 the existence of a federal and provincial process and
13 not evidence about the effects of products themselves.

14 Therefore, it is our submission that the
15 Board knows now everything that it that is relevant to
16 determine this issue in any of the ways in which we
17 suggested yesterday.

18 And I think it's fair to say, Mr.
19 Chairman, that the longer MNR waits to address this
20 matter, the less easy it becomes or the more difficult
21 it becomes for the Ministry to rectify the deficiency
22 before the end of their case.

23 Mr. Campbell's argument is that it's
24 premature, and I gather that's the submissions of at
25 least Ms. Murphy as well. It is our submission that at

1 the end of the hearing someone no doubt will argue that
2 it's too late. In our view, the best way to proceed in
3 the circumstances is to act early before the problem
4 becomes uncorrectable.

5 Now, continuing with Mr. Campbell. I
6 believe yesterday in response to my reference to a
7 portion of the Environmental Assessment Document, I
8 believe he indicated that what MNR has said in their
9 EA, and perhaps you might want to refer to this page
10 as well, Mr. Chairman, it's page 93.

11 MS. CRONK: Of the EA?

12 MR. CASTRILLI: Of the Environmental
13 Assessment Document, yes.

14 I believe what Mr. Campbell said was, and
15 in interpreting what MNR had written was, that all MNR
16 has said is that pesticides may create concerns about
17 human health effects and that they have simply recorded
18 that there are concerns, not that there is any evidence
19 about their being environmental -- or excuse me, about
20 there being health effects. And I believe those were
21 what my notes indicated hsi having said.

22 I would like you to look at page 93,
23 beginning at line 8. Now, the sentence I read into the
24 record yesterday was the first sentence. It says:

25 "The use of herbicides and

1 insecticides/fungicides for tending and
2 protection purposes may create concern
3 for possible health effects among local
4 residents and recreationists."

5 Now, the next sentence or the next part
6 of the sentence reads:

7 "The degree of human exposure depends
8 greatly on human use of the area."

9 Now, just stopping there. Is that a
10 reassuring statement for the Board with respect to the
11 issue of human health effects, is that a reassuring
12 statement for any decision-maker if there is in fact
13 nothing else in the material dealing with issues such
14 as that and, indeed, the other issues that are raised
15 in that paragraph.

16 Now, I outlined yesterday other passages
17 in the Ministry material that note, for example, that
18 forest managers need to have basic information about
19 effects of registered and approved pesticides. Mr.
20 Campbell's comment simply doesn't seem to take account
21 of the fact that the Board needs to be able to satisfy
22 itself on this issue of human health effects and it
23 seems to me that Section 5(3) was written precisely so
24 that whoever the decision-maker was, whether it is the
25 Board or the Minister, that decision-maker would be in

1 a position to satisfy himself.

2 Page 93 raises more questions than it
3 answers. And I don't think that's a proper and
4 appropriate state of affairs in which to leave this
5 issue.

6 The other thing that arises from Ms.
7 Murphy's comments - and while I'm on this point I might
8 as well deal with it - she opened her comments
9 yesterday to the effect that they don't know what our
10 case is, almost to suggest that human health effects as
11 an issue hasn't arisen before we raised it in this
12 motion, or that if it had arisen their response was:-
13 The appropriate way to proceed is to simply tell this
14 Board about the federal/provincial process, full stop.

15 Now, are my friend seriously suggesting
16 that this issue of potential human health effects never
17 came up in discussions over the last 12 years this
18 exemption order has been in effect between the Ministry
19 of Environment and the Ministry of Natural Resources,
20 about what in fact this Environmental Assessment
21 Document should contain on this issue?

22 Are my friends at the Ministry of Natural
23 Resources telling this Board that they never looked at
24 the experience and the law in other jurisdictions with
25 environmental assessment legislation and at the issue

1 of pesticide spraying in forests. The Bergland case
2 that I referred this Board to yesterday is a decision
3 from 1977. Are its contents news to MNR?

4 Mr. Chairman, on this point, I just don't
5 think it is credible for the Ministry to take the
6 position that on the issue of human health effects they
7 have been taken by surprise. It is reflected in their
8 material, however imperfectly it appears there, it
9 clearly is an issue they address their minds to and for
10 whatever reasons they decided not to deal with it in
11 the remainder of their EA, and I believe that is an
12 issue that this Board can rectify now.

13 Mr. Campbell also suggested, at least my
14 notes reflect, that the procedures set out in Section
15 5(3) of the Act recognizes that there is a reasonable
16 limit beyond which a proponent need not go with respect
17 to describing effects. And I think it's fair to say
18 that we do not dispute that, the phrase reasonable
19 clearly appears in the section.

20 But it is our submission that there has
21 been no effort, reasonable or unreasonable, to describe
22 potential human health effects of the pesticides MNR
23 proposes to use. That is a decision that has been made
24 by the Ministry of Natural Resources as a matter of
25 policy on this issue and I believe it's a matter this

1 Board can rectify because, quite clearly, Section 5(3)
2 says report upon effects including human health
3 effects.

4 Now, continuing with Mr. Campbell for a
5 moment. My notes also indicate that he noted at one
6 point that it is not relevant to this tribunal, or for
7 this tribunal to know that other federal and provincial
8 laws which regulate pesticides are not in fact
9 environmental assessment statutes, did not in fact
10 require hearings when they made their decisions, were
11 not obligated to deal with issues of alternatives in a
12 number of other the matters --

13 MR. CAMPBELL: Mr. Chairman, if I am
14 going to be quoted, I am going to be quoted accurately.
15 I did not say it was not relevant to this matter, I
16 said it was not relevant for the purposes of Mr.
17 Castrilli's application, this specific narrow
18 application.

19 THE CHAIRMAN: In terms of compellability
20 of the calling of this kind of evidence?

21 MR. CAMPBELL: That's the relief that's
22 being asked for, Mr. Chairman.

23 THE CHAIRMAN: Okay.

24 MR. CASTRILLI: Well, Mr. Chairman, I
25 think with all due respect it is relevant. If the

1 Board is going to be asked to permit the judgment of
2 another federal or provincial agency to be substituted
3 for its judgment with respect to the issue of human
4 health effects, what could possibly be more relevant
5 than to know and to recognize that these other agencies
6 did not in fact go through the process this Board must
7 go through under this statute before this Board makes a
8 decision.

9 So I would suggest, with great respect,
10 that contrary to Mr. Campbell's submission, the
11 approach that he is suggesting would result -- that
12 would result from his suggestion, is the very essence
13 of improper delegation of authority and that is the
14 point I thought he was trying to deal with yesterday.

15 Now, continuing with Mr. Campbell, I
16 believe he also noted that there was a right way and a
17 wrong way to get the material we want before the Board,
18 and I believe he characterized our approach as the
19 wrong way and, therefore, the Board should not grant
20 the motion. And he posited what he regarded as the
21 right way, and I won't go through all of that again
22 other than to suggest that there is more than one way
23 to skin a cat.

24 And I have to also ask and raise with
25 this tribunal whether they are sure that his approach,

1 in the circumstances of this case, would not in fact be
2 the wrong way to proceed, would not in fact set an
3 extremely bad precedent in law and in policy for this
4 tribunal to follow by placing even an evidentiary as
5 opposed to a persuasive onus on other parties to adduce
6 evidence in the absence of the Ministry on an issue
7 such as this and permitting proponents to evade very
8 clear statutory obligations in first instance.

9 The value of our approach --

10 THE CHAIRMAN: But in doing so, you are
11 recognizing that any proponent runs a serious risk?

12 MR. CASTRILLI: Any proponent runs a
13 serious risk if it knows it's running a serious risk.
14 It's not at all clear at this point in time what the
15 perceptions of the Ministry are with respect to this
16 issue and, as I said, we don't want to --

17 THE CHAIRMAN: But it's open to the
18 opposition, intervenors whatever, or the Board itself
19 to indicate its concerns with a lack of evidence
20 concerning particular issues with the implication that
21 if those issues are not addressed in some fashion that
22 they may run the risk of having an application denied.

23 I mean, that implicit remedy or result,
24 if you want to call it that, is always there and you
25 would not disagree with that?

1 MR. CASTRILLI: No, I agree with that as
2 long as the Ministry of Natural Resources knows that
3 because the Board indicates that to them now, not
4 simply because it remains an unknown quantity.

5 THE CHAIRMAN: No, but even if the Board
6 did not indicate any such thing now, it's still open to
7 any of the other parties to raise it as an issue on
8 their own, argue at the end of the case that the Board
9 should so consider it in a serious light, and that if
10 the Board is persuaded that that issue is one that is
11 integral to the application and the disposition of it,
12 that the appropriate result will follow.

13 Just because the Board doesn't somewhere
14 along the case indicate all of its concerns at that
15 point, surely doesn't take away the right of any of the
16 parties in argument at the end of the case to raise
17 those concerns?

18 MR. CASTRILLI: Mr. Chairman, that's
19 true, I don't disagree with that. The difficulty I
20 think you face as a decision-maker at the end of this
21 case, whenever it is going to end--

22 THE CHAIRMAN: If.

23 MR. CASTRILLI: I didn't say if, I have
24 faith. I believe there are certain constraints that
25 are placed upon you, the longer an unfinished matter

1 remains unfinished. And I would be concerned, and I
2 believe my clients are concerned, about the potential
3 for your ability to decide, being constrained by the
4 eleventh hour nature of the situation.

5 It's precisely why we have raised this
6 issue in March of 1989 and have not waited until March
7 of 1993 because, at that point, I am sure I would have
8 heard from my friends that it's completely unfair for
9 us to come out of the weeds on this issue at that
10 point.

11 THE CHAIRMAN: And, frankly, that is one
12 of the major benefits or reasons for things like the
13 exchange of witness statements, the interrogatory
14 process and the scoping procedure that we have set in
15 place so that parties can clearly, in a timely fashion,
16 raise their concerns, advise parties opposite of what
17 areas of the evidence they are concerned about and
18 perhaps wish additional facts to be put in evidence,
19 and ultimately advise the other parties of what they
20 may face at the end of the case if those matters are
21 not addressed.

22 And by that I mean likely an argument
23 made at the end of the case that there has been a
24 material deficiency for which the Board should consider
25 in its ultimate decision.

1 MR. CASTRILLI: That's fair enough, Mr.
2 Chairman. I just wanted to make the point that the
3 value in our approach is that the persuasive onus stays
4 where the statute says it belongs. Now, I don't think
5 that can be forgotten in the context of the statute.

6 While I am on this point, close on the
7 heels of the point that was raised by Mr. Campbell
8 yesterday was a concern that not only he but also Ms.
9 Cronk and Ms. Murphy expressed about how I
10 characterized our role in this hearing - not that it is
11 material to this motion - that of rebutting --
12 providing rebuttal evidence in these proceedings.

13 Let me just assure my friends that
14 generally the case for FFT will be rebuttal in its
15 broadest and most positive sense. Now, I am not sure
16 that this will actually be reassuring to my friends
17 when it is upon them, but let me just clarify the
18 record if there was any misunderstanding.

19 But I think we have to keep our eyes on
20 the ball. The issue here is the statutory obligation
21 of the Ministry of Natural Resources to comply with
22 Section 5(3) and that is the issue to be addressed.

23 Now, I believe Ms. Cronk referred you to
24 Tab 1 of her authorities. This was the federal
25 registration process, and I believe she advised you

1 that the process requires -- or I should say, the
2 existing regulatory process requires submission of
3 effects data.

4 Mr. Chairman, as I think I have probably
5 said more than once by now, knowing this does not tell
6 the Board anything about what the effects are, which is
7 what Section 5(3) is directed to.

8 Now, I think Mr. Martel got it just right
9 yesterday when he asked Ms. Cronk if the process is
10 okay, why are they doing a review of it. Mr. Chairman,
11 we suggest one reason they might be doing a review of
12 it --

13 MS. CRONK: Well, I'm sorry, Mr.
14 Chairman, is my friend now going to give evidence about
15 the motivation of the federal government in announcing
16 this review? It was with some care and in a genuine
17 effort to assist that I answered Mr. Martel in the way
18 that I did.

19 THE CHAIRMAN: And it's really
20 speculative, nobody really knows what their intentions
21 were.

22 MS. CRONK: Even if we did, sir, we can't
23 inform you through legal argument at this time. I
24 object.

25 MR. CASTRILLI: I appreciate Ms. Cronk's

1 comments. I didn't mean to leave the impression that I
2 was about to embark on the giving of evidence. Let me
3 just state two factual matters that are apparent from
4 the statutes.

5 The Pest Control Products Act has only
6 been amended twice in the last 50 years, 1939 and 1969.
7 If the Criminal Code had only been amended twice in the
8 last 50 years, imagine what the state of the nation's
9 criminal law would be in.

10 THE CHAIRMAN: It could have been a very
11 good act or a very good code, and the one that was
12 passed in 1765 could last for, you know, another 300
13 years or something.

14 MR. CASTRILLI: I don't have my copy of
15 the 1934 Criminal Code here. But in any event, I think
16 the point simply is, it's a statute that has not been
17 dealt with by parliament terribly often.

18 THE CHAIRMAN: Well, you're trying to
19 draw a conclusion from that that may or may not be
20 supportable, so...

21 MR. CASTRILLI: Fair enough. I just
22 thought it would appropriate to raise it with the Board
23 so that it did not think that this is a statute that is
24 the last word on the issue.

25 THE CHAIRMAN: I can think of a lot of

1 statutes, Mr. Castrilli, that are amended right, left
2 and centre and they never get it right.

3 MS. CRONK: I'm glad you said that, sir.

4 MR. CASTRILLI: Now, my notes indicate
5 that Ms. Cronk characterized the compulsion of a
6 witness as being more than procedural but in fact
7 substantive. My notes also indicate that Mr. Campbell
8 indicated that my motion was procedural and not on the
9 merits. I don't know what to make of that other than
10 that I don't think that inconsistency in their position
11 helps them in their argument.

12 Now, Ms. Cronk also made the submission
13 that Section 4 of the Board's rules does not provide
14 express or implied jurisdiction for the compelling of
15 evidence, and I don't believe that I said that it
16 provided express jurisdiction. I think what I said was
17 it was necessary to consider the entire context of the
18 statute, the nature of the inquiry to be made, the
19 positive statutory obligations imposed upon the
20 proponent in conjunction with the rules.

21 THE CHAIRMAN: And provided that whatever
22 is contemplated is necessary and permitted by law?

23 MS. CASTRILLI: I'm coming to that, Mr.
24 Chairman. You anticipated my next thought. So that it
25 is important to realize that when you do all of those

1 things you must give meaning to the phrase: The Board
2 may do whatever is necessary and permitted by law to
3 permit it to effectively and completely adjudicate on
4 the matter before it.

5 I am just going to deal for a moment with
6 the terms 'necessary and permitted by law' in response
7 to Ms. Cronk's submission. It is our position that
8 unless the Ministry of Natural Resources voluntarily
9 complies with Section 5(3) it will be necessary for the
10 Board to grant our relief or else it will be necessary
11 to deny MNR an approval for the use of these
12 pesticides.

13 THE CHAIRMAN: What about the conjunctive
14 'and permitted by law'?

15 MR. CASTRILLI: I'm coming to 'permitted
16 by law'.

17 THE CHAIRMAN: No, but I guess -- do you
18 not have to read them together?

19 MR. CASTRILLI: Yes, I'm going to.

20 THE CHAIRMAN: It may be something that's
21 necessary because of a statutory provision, but also
22 not permitted by law.

23 MR. CASTRILLI: That's quite right, that
24 could be possible and I'm going to come to the
25 'permitted by law' part. Just for the sake of being

1 able to convey this to you, I wanted to deal with it
2 one at a time.

3 It is our submission that these are the
4 only options available that will maintain integrity of
5 the Environmental Assessment Act process which is what
6 I believe Section of 4 of the rules includes within its
7 ambit.

8 Now, let me go on to the issue of
9 'permitted by law' because that was the other matter
10 that was dealt with by Mr. Cronk when she was
11 discussing Section 4 and a number of cases that arise,
12 not out of that section but out of the general civil
13 law.

14 I believe her submission to you was that
15 the case law indicates that the relief we seek is not
16 permitted by law, the other half of that discussion
17 about Rule 4, and I am sure the Board will recall that
18 both Ms. Cronk and myself and others have expounded at
19 great length on whether the civil litigation case law
20 has any applicability in the context of the
21 Environmental Assessment Act in terms of that statute's
22 structure, context and positive statutory obligations.

23 Now, she referred you, as you will
24 recall, to cases such as re Fraser and re Enoch which,
25 as we all know, are civil litigation cases. She used

1 them for the proposition that one should also apply
2 their ratios to administrative proceedings and, of
3 course, as you remember, I suggested why one should not
4 do that.

5 She also referred you to two other cases
6 from her book of authorities that were not actually
7 reproduced in their entirety, just referred to in one
8 of her tabs, the Harwood and Cooper vs Wilkinson case
9 and Conner and the Township of Brant, and I believe she
10 provided you with a headnote from the Harwood case
11 which indicated it was in fact yet another civil
12 litigation case.

13 As I recall from my notes, it was
14 uncertain at the time whether Conner and Township of
15 Brant was another civil litigation case or whether it
16 in fact involved a tribunal. In an effort to just
17 clarify the record on that, I have the headnote from
18 the Conner and Township of Brant case, not the entire
19 case, but it is clear at least from the headnote that
20 it is another civil litigation case. And if the Board
21 and my friends would like a copy of this headnote, I
22 would be pleased to provide it at this time.

23 THE CHAIRMAN: I think we wouldn't mind
24 having a copy of the headnote actually.

25 MR. CASTRILLI: (handed)

1 THE CHAIRMAN: Thank you. I take it the
2 date on that case is 1914?

3 MR. CASTRILLI: Yes, that's correct.

4 THE CHAIRMAN: Were there any
5 administrative tribunals in existence in 1914, Mr.
6 Castrilli?

7 MS. CASTRILLI: I can't give evidence,
8 Mr. Chairman.

9 I don't really wish to say anything
10 further about the Conner and Brant case other than to
11 note that it is indeed just another civil litigation
12 case.

13 In conclusion on this point, I just raise
14 it because I do not think the existence of either of
15 these two cases advances the proposition that was put
16 forward by Ms. Cronk yesterday.

17 Mr. Chairman, Ms. Cronk also referred to
18 the B.C. College of Physicians and Surgeons case from
19 B.C. -- sorry from 1987 and I don't wish to dwell on
20 this case either, I just want to note a couple of
21 points about it and how to think about it, if you are
22 thinking about it at all.

23 Firstly, it doesn't say in either the
24 B.C. Court of Appeal or Supreme Court that parties in
25 administrative proceedings are solely responsible for

1 calling evidence as they see fit.

2 Secondly, all the court held in the Kuntz
3 case, on the peculiar facts of that case, was that the
4 doctor did not demonstrate that he needed a right of
5 cross-examination at that stage of the inquiry in the
6 interest of natural justice. I would note, Mr.
7 Chairman, that however the court did not completely
8 preclude the doctor from ever obtaining the right of
9 cross-examination.

10 I refer you in this regard to
11 paragraph -- excuse me, to page 183 of the Court of
12 Appeal decision on the middle of the page, the middle
13 paragraph. First quoting from the judgment of the
14 chambers judge who Reasons for Judgment included at
15 page 199 of the trial decision:

16 "I do not go so far as to say that the
17 members of any investigating committee
18 should not be examined."

19 And that's the end of the quote from the
20 trial decision -- or the chambers decision. And then
21 the next paragraph, which is now in the words of the
22 Court of Appeal:

23 "In other words, the learned chambers
24 judge was dealing with the facts before
25 him. He did not hold that

1 cross-examination of the members of the
2 investigating committee was precluded
3 under all circumstance. As counsel for
4 the respondent agreed, circumstances
5 might arise at a later stage in the
6 proceedings where the rules of natural
7 justice would require that
8 cross-examination of the members of the
9 investigating committee be permitted."

10 I just wanted to add that as a gloss on
11 the meaning of that decision or the extent to which it
12 applies in these circumstances.

13 There are a number of other aspects to
14 the case that are really distinguishable from what we
15 are talking about here, Mr. Chairman, and these
16 include; firstly, a very uncomplicated, unsophisticated
17 inquiry mechanism under the Medical Practitioners Act,
18 in particular, Section 48.

19 Secondly, it is very clear that Section
20 48 of that statute is not by any stretch of the
21 imagination the B.C. equivalent of Section 5(3) of the
22 Environmental Assessment Act for medical doctors.

23 Thirdly, as you noted yesterday, Mr.
24 Chairman, the investigating committee was not empowered
25 to make a decision as this Board is.

1 And, finally, there was a concern in the
2 Kuntz case, given the relatively simple statutory
3 regime that was in place of not over-complicating the
4 investigative process of the B.C. Council investigating
5 the matter. And I would simply note, Mr. Chairman,
6 that that is not a valid concern or even an applicable
7 concern here as the Environmental Assessment Act in
8 fact already imposes a number of important obligations
9 on the proponent.

10 What we are asking in our motion is, we
11 are not asking the Board to unduly burden or
12 over-complicate the EA process, all we are simply
13 asking the Board to do is to require the Ministry to
14 fulfill its obligations under the statute. So I think
15 in the circumstances that the Kunta case doesn't go any
16 farther than that.

17 Now, yesterday afternoon or evening Ms.
18 Murphy complained at the commencement of her comments
19 about "not knowing the case that MNR has to meet from
20 the intervenors and on being required to meet potential
21 issues when they do not know what they are".

22 I was somewhat confused by those
23 comments. I was always of the view or at least under
24 the impression that the role of a proponent was to make
25 its case on the basis of the statute's requirements.

1 In those circumstances, I don't see how not knowing
2 about environmental or human health effects could be
3 taken to be a credible position given what's to be
4 found, such as it is, in the Environmental Assessment
5 Document of 1987 and the earlier drafts as well.

6 Now, Ms. Murphy also told us that we are
7 going to hear evidence on how the federal regulatory
8 process works from witnesses such as, and I believe she
9 mentioned Mr. Kingsbury in Panel 13. I don't know how
10 that is going to help this Board on the issue before
11 it, which is with respect to the issue of human health
12 effects. As far as I can determine from Dr. -- or Mr.
13 Kingsbury's curriculum vitae - and perhaps Ms. Murphy
14 can correct me if I am wrong - he is not being
15 qualified as an expert on the potential human health
16 effects of the pesticide products MNR proposes to use.
17 As far as I can tell, Mr. Chairman, he is a
18 limnologist, an expert really on aquatic habitat.

19 Now, both yesterday and this morning Ms.
20 Murphy indicated that the data on human health effects
21 in the federal process is not available to the Ministry
22 of Natural Resources. I would simply note, Mr.
23 Chairman, that the Pest Control Products Act process
24 also reviews information on environmental effects and,
25 as I noted yesterday, the Ministry was able to produce

1 a report on environmental effects. So I simply do not
2 see the problem of why they could not comply with
3 Section 5(3).

4 I am going to come back at the end of my
5 comments to where Ms. Murphy ended her submissions on
6 this point, but I would like you to keep that in mind
7 for a moment.

8 THE CHAIRMAN: Which report are you
9 referring to?

10 MR. CASTRILLI: That's the ESSA Report.

11 THE CHAIRMAN: The ESSA Report.

12 MR. CASTRILLI: Yes, which I understand
13 will be dealt with in Panel 13. Sorry, I should
14 correct that, I believe they are excerpts...

15 THE CHAIRMAN: But isn't the ESSA Report
16 a document -- or sorry, a study commissioned by the
17 Ministry specifically to deal with environmental
18 effects, natural environmental effects as opposed to
19 documentation relied upon by the other authorities?

20 MR. CASTRILLI: Yes, I -- well, I'm not
21 certain at this point in time. But I think the point
22 is two-fold. The only information on this doesn't
23 simply reside in the coffers of the federal government,
24 that's the first point. I haven't suggested that the
25 only way they can get this information is to go to the

1 federal and provincial regulatory agencies. They are
2 the ones who have interposed that --

3 MS. MURPHY: Excuse me, I gave that
4 information in response to a question from the Board:
5 Would the Board be provided with the information that
6 was before federal regulatory decision-makers when they
7 made their decision. And it was in that context that I
8 responded.

9 MR. CASTRILLI: Well, I wasn't responding
10 to that, Ms. Murphy, I'm sorry if you took it that way.
11 I was responding to the fact that in your material,
12 your witness statements, your letters, your factum and
13 your oral submissions prior to the question you were
14 telling this Board that what it should consider is the
15 federal and provincial regulatory process. Now, I said
16 I was going to come back to that issue and I will in a
17 moment.

18 Now, Ms. Murphy yesterday also indicated
19 that there are -- I think she used the term "people
20 here", who can respond to the issue of risk assessment
21 done under the federal process. Well, I also look
22 forward to hearing that evidence because I did not
23 notice any expert on either risk assessment or human
24 health effects of the ten who are supposed to testify
25 in Panels 12 and 13, and there certainly is no evidence

1 proposed about either topic in Panels 12 and 13.

2 MS. MURPHY: I think, if I recall - and I
3 would like to check the transcript - but my best
4 recollection is that I advised that some of the
5 witnesses would be able to respond to questions about
6 that.

7 MR. CASTRILLI: I will come back to that
8 at the end of my comments.

9 Now, this morning Ms. Murphy indicated
10 that you as a tribunal cannot test the sufficiency of
11 evidence until you have heard it. Well, I have read
12 the material, I have read the environmental assessment,
13 I have read Panels 12 and 13, I have read the
14 interrogatories, to the extent that they have been
15 answered, and it seems to me that to embark in-chief,
16 if that's what Ms. Murphy is --

17 MS. MURPHY: Excuse me, to the extent
18 they have been answered, we received Mr. Castrilli's
19 interrogatories on Panel 13 last week.

20 MR. CASTRILLI: That's terrific. Mr.
21 Chairman, if my friend is proposing to embark on new
22 testimony during the course of her chief that is not
23 otherwise reflected in the environmental assessment or
24 the witness statements now, I don't believe that's
25 something that's currently contemplated by your

1 proposals. If her comment is really: If we ask a
2 question about human health effects during
3 cross-examination and we get an answer, well, that's
4 adequate.

5 Well, I don't know. I think I have to
6 leave that to you, Mr. Chairman, but that is the burden
7 of my motion, whether that's the way to be doing this
8 or not, considering there is nothing on human health
9 effects in the material that we have seen.

10 Now, this morning you raised Section 11
11 of the Environmental Assessment Act. I actually had
12 mentioned that section several times yesterday in my
13 oral submissions, and it is our view that the Board is
14 in the same position as the Minister. The Board stands
15 in the shoes of the Minister in all respects until the
16 Board makes a decision. So that the Board could now,
17 given notice to MNR to do whatever is necessary to
18 comply with anything you believe is deficient in what
19 they have filed.

20 THE CHAIRMAN: And how do you arrive at
21 that conclusion? What's your rationale for that?

22 MR. CASTRILLI: If you look at Section
23 11(1). The section begins:

24 "Where before accepting an environmental
25 assessment the Minister is of the opinion

1 that the EA submitted does not comply
2 with the Act or regulations..."

3 Among the things the Minister can do is
4 it can serve notice and deal with the matter in the
5 manner that is set out in the remainder of Section 11."

6 THE CHAIRMAN: Why didn't they include
7 words: "The Minister or the Board, where a hearing is
8 held...", et cetera. Why does it only refer to the
9 Minister in that section, apart from perhaps being bad
10 drafting.

11 MR. CASTRILLI: Well, that was my first
12 point. I think it's fair to say, Mr. Chairman, that
13 the statute as it was constructed was designed to move
14 forward sequentially. I don't think, however, it was
15 designed to be interpreted so that if you thought you
16 got past stage 1 with everything you needed, but you in
17 fact didn't have everything you needed, there wasn't a
18 capability in a subsequent decision-maker to come back
19 and correct that deficiency.

20 So I think the statute and the parts of
21 the statute have to be read as a whole.

22 THE CHAIRMAN: Yes, but how do you get
23 around the normal rules of statutory construction that
24 if it isn't specifically included it is to be read as
25 excluded.

1 MR. CASTRILLI: Well, the rules -- your
2 rules, Rule 4 in particular -- in my view, the statute
3 hasn't dealt with the issue but I believe Rule 4 has.

4 THE CHAIRMAN: Yes, but surely our rules
5 are subject to any statute. We can't go beyond in our
6 rules what is provided by a statute surely.

7 MR. CASTRILLI: No, that's true, but
8 there is authority in the statute for the promulgation
9 of rules with respect to how the Board will deal with
10 respect to environmental assessments that come before
11 it.

12 And, in my view, that has taken you to
13 the position that Rule 4 permits you to deal with the
14 things and the various matters that are otherwise
15 contemplated by the statute to be dealt with only by
16 the Minister as being matters that you too can deal
17 with once you have the assessment and you stand in the
18 shoes of the Minister.

19 I don't want to dwell on it, Mr.
20 Chairman, it wasn't part of my written submissions and
21 it probably --

22 THE CHAIRMAN: Take a look at Rule 3.

23 MR. CASTRILLI: Rule 3.

24 THE CHAIRMAN: And I might inform you,
25 Mr. Castrilli, I drafted these rules and so am fairly

1 familiar with them and Rule 3 was sort of put in to
2 allow flexibility but, by the same token, make it quite
3 clear that the rules could not be in conflict with the
4 statute.

5 MR. CASTRILLI: Yes, I agree. I mean, if
6 there's a flat contradiction in the statute, your rules
7 could not be taken to take precedence. I don't believe
8 Section 11 constitutes a flat contradiction.

9 Now --

10 MR. MARTEL: But you would agree that
11 there is nowhere in 11 authorizing the Board to exceed
12 what is in the legislation itself?

13 MR. CASTRILLI: No, Section 11 clearly
14 does not mention the Board. I don't dispute that.

15 Now, Ms. Murphy also referred you, Mr.
16 Chairman, to the Temagami decision. Sorry, Mr.
17 Chairman, did you have further questions on Section 11?

18 THE CHAIRMAN: No. Before you go into
19 this, it's now twenty-five after and Ms. Swenarchuk
20 indicated that this meeting was going to start at
21 12:30.

22 Perhaps we could commence with the
23 Temagami case after the lunch break.

24 MR. CASTRILLI: Well, actually I don't
25 have that much left that would take me more than about

1 15 minutes.

2 MS. SWENARCHUK: No, sorry.

3 THE CHAIRMAN: You lose.

4 MR. CASTRILLI: I lose. All right.

5 THE CHAIRMAN: Same group, different
6 opinion.

7 MR. CASTRILLI: I fairly lose. All
8 right. I will continue at your pleasure.

9 THE CHAIRMAN: At two o'clock.

10 MR. CASTRILLI: Two o'clock.

11 THE CHAIRMAN: Thank you.

12 ---Luncheon recess taken at 12:25 p.m.

13 ---On resuming at 2:10 p.m.

14 THE CHAIRMAN: Thank you. Be seated,
15 please.

16 MR. CASTRILLI: Thank you, Mr. Chairman.

17 When we left off, I was just going to
18 briefly indicate with respect to the Temagami case my
19 understanding that it too is under appeal.

20 THE CHAIRMAN: That's going to the
21 Supreme Court of Canada.

22 MR. CASTRILLI: Ontario Court of Appeal.

23 MS. MURPHY: There's been an application
24 to appoint leave to appeal.

25 MS. CRONK: Leave to appeal.

1 MR. CASTRILLI: And, Mr. Chairman, as I
2 believe you essentially noted with respect to that
3 case, this tribunal is not in nearly a supervisory
4 capacity with respect to this undertaking. You are a
5 trier of fact, if I can use that term, and the statute
6 gives this tribunal the authority to decide whether it
7 believes there has been compliance with Section 5(3) or
8 not. That's all I really wanted to say on that case.

9 On the next point that was raised by Ms.
10 Murphy this morning, the discussion of the
11 applicability of the U.S. cases that I referred you to.
12 It's our position that the reason that case law is
13 applicable to the situation before this tribunal and,
14 in our view is the way in which we believe the Board
15 should view the matter, is that that case law
16 essentially indicates that if a federal agency produces
17 a document that is not in compliance with the statute,
18 that agency cannot proceed with the undertaking and if
19 it tries to do so, the courts will adjoin it from
20 proceeding.

21 And that is the consistent ratio through
22 the Bergland decision, the Calvert Cliffs decision and
23 the Environmental Defense Fund and the Hardin decision
24 that is referred to in the Stein case.

25 Under the Environmental Assessment Act

1 the proponent must satisfy the Board that environmental
2 assessment and its witness statements meet the
3 requirements of the Act and if the proponent does not
4 do that, then it is open to this Board to prevent MNR
5 from proceeding with any part of the undertaking that
6 is not in compliance. It's really the discussion we
7 had yesterday. I didn't really mean to deal with the
8 matter more than that.

9 With respect to the Stein case itself,
10 which is found in the authorities of the Ministry of
11 Natural Resources I believe at Tab 8, I think it's
12 clear that that decision was decided on the basis of
13 whether, on the balance of convenience an injunction
14 should issue on the facts of that case; nothing more,
15 nothing less.

16 Now, I want to talk very briefly about
17 the federal/provincial process issue that has cropped
18 up more than once. Let me see if I can just very
19 quickly reconstruct what I think has gone on in the
20 submissions of the Ministry which our motion has
21 precipitated further discussion on.

22 We have said, looking at Section 5(3) of
23 the Act, this appears to require the proponent to deal
24 with the issue of effects. It's entirely -- and as
25 long as the proponent deals with the issue of effects,

1 both environmental and human health and provides
2 evidence on that issue for the Board to adjudicate on,
3 the proponent would be dealing with the issue the way
4 Section 5(3) says it should be dealt with.

5 But that is not what we have heard and
6 that's my submission, we have heard from the Ministry
7 of Natural Resources is what we are going to hear is
8 evidence on effects. They have said to you in writing,
9 in their evidence -- excuse me, in their witness
10 statements and in their factum and now in their oral
11 submissions to you that what they believe is the
12 equivalent of that or certainly acceptable for your
13 purposes of determination is a discussion about the
14 federal/provincial process.

15 So if I understand where they are going
16 at this part is that they are essentially telling you
17 that the existence of this federal and provincial
18 process is justification for not calling evidence about
19 effects.

20 And just at that point I simply think
21 it's fair for us to say: Well, that's clearly not what
22 the statute says and if you are going to talk about
23 federal and provincial process, then I believe the
24 questions you raised with Ms. Murphy this morning are
25 appropriate. We are not necessarily and have never

1 asked them to talk about the process and, therefore,
2 necessarily any of the studies done in relation to that
3 process. There is a world of literature out there that
4 is not solely connected to the federal/provincial
5 process. However they wish to comply with 5(3) in
6 dealing with effects that is entirely up to them, as
7 long as they deal with effects.

8 THE CHAIRMAN: But what exactly -- just
9 to clarify it for us, Mr. Castrilli, as to what you
10 would want. If the Ministry is going to produce a
11 report dealing with the effects of pesticides on
12 humans, what do you expect a report like that to
13 contain?

14 It may contain conclusions to say that we
15 have examined the literature and scientific information
16 out there and have concluded that there are or are not
17 effects which we should be concerned with and, if there
18 are, perhaps propose mitigative remedies and things
19 like that.

20 Now, are you saying that you would be
21 content with receiving a report that purports to look
22 at the scientific literature and/or studies and arrive
23 at conclusions without going into details of those
24 scientific studies and other data upon which those
25 conclusions are based?

1 MR. CASTRILLI: Well, I don't think it's
2 for me to ultimately say what's acceptable for you.

3 THE CHAIRMAN: No, no, but the point...

4 MR. CASTRILLI: But in terms of format --

5 THE CHAIRMAN: Excuse me a moment.

6 MR. CASTRILLI: Sorry.

7 THE CHAIRMAN: The point is, is that
8 should the Board be persuaded that such evidence should
9 be produced and the evidence is produced but the
10 underlying studies are not produced, all of the data
11 going into those conclusions which a particular witness
12 might formulate from a review of all of that kind of
13 evidence is not produced, is it going to be the
14 position of your client or others to stand up and say:

15 Okay, that is terrific, you have reached
16 a conclusion. Now, let's take a look at what's behind
17 the conclusion and now let's look at all of those
18 studies so that we can examine and cross-examine in
19 detail the authors of all of the various scientific
20 literature and/or studies out there so that we have an
21 opportunity to impune them.

22 And if that's the case, then we are
23 perhaps into a situation that, for lack of any other
24 criticism, will take a very long time.

25 MR. CASTRILLI: Well, I think I said --

1 THE CHAIRMAN: Because we are dealing
2 with a number of compounds and a number of chemicals
3 and some of these same studies and same scientific data
4 have been covered to some extent in terms of these
5 other regulatory proceedings. And so we just want a
6 clear understanding of what your client expects in this
7 area had, in your view, the proponent complied, in your
8 view, with Section 5(3).

9 MR. CASTRILLI: Well, I think I actually
10 answered this question yesterday and I'm certainly
11 pleased to respond to it again.

12 The Ministry has produced a report called
13 the ESSA Report for which there will be a witness to
14 speak to - although I understand that the witness is
15 actually not the autor of the report, but leaving that
16 aside - that witness will apparently be qualified to
17 talk about the contents of that report, and it also has
18 an extensive bibliography in it which is relied upon by
19 the authors of that study and we have actually asked
20 for a number of the reports that are found in it and,
21 as far as I know, we are going to get them or they are
22 otherwise available.

23 It seems to me that is an entirely
24 reasonable process to go through with respect to this
25 issue as well.

1 THE CHAIRMAN: Okay. So what you are in
2 effect asking for is: Should we assume the
3 jurisdiction, which we may or may not have, to go into
4 a total examination of the health effects from the use
5 of these chemicals that it may be in fact a repetition,
6 in fact it may go beyond what has been brought before
7 both the federal regulatory authority and, to some
8 extent, the provincial regulatory authority already.
9 Is that right?

10 MR. CASTRILLI: Well, I think what you
11 have to recognize is you have the ESSA Report. That
12 report, as far as I can tell, deals with the issue of
13 environmental affects, that's the title. I would take
14 it at its title. That is an issue that is also dealt
15 with, according to the Ritter document, under the
16 federal process. It doesn't mean it was dealt with the
17 same way.

18 I have gone through a federal
19 cancellation hearing on one product and I'm not talking
20 about that kind of a hearing where we had 30,000 pages
21 of documentation for one product. That's not the kind
22 of hearing I'm talking about, it's not the kind of
23 hearing in fact really contemplated necessarily by
24 Section 5(3).

25 But seems to me what was produced in ESSA

1 is a bottom line response to what Section 5(3) is about
2 and if they can do it for environmental effects, I see
3 no reason and I have heard no reason why they can't do
4 it for human health effects.

5 MRS. KOVEN: Would one reason, not that
6 it would prevent them from doing it, but it seems to me
7 that in the ESSA Report they were dealing with the
8 subject matter that was the concern of the Ministry of
9 Natural Resources. When we look at human health
10 effects, as far as I know, they don't have many
11 biochemists or toxicologists or epidemiologists on
12 staff at the Ministry of Natural Resources; that is not
13 the sort of work they do.

14 So I agree with you, I think the ESSA is
15 format, as I say, is a commendable one but in terms of
16 how that exercise could be worked, I think it would be
17 slightly different than it was with the environmental
18 effects

19 MR. CASTRILLI: I agree. I suspect they
20 will have to get consultants as well. But I believe
21 ESSA is in fact a consulting firm, so it wasn't either
22 completely internally MNR or really internally done by
23 MNR at all.

24 THE CHAIRMAN: Well, you can understand
25 the Board's concern in this area. We don't want to, in

1 effect, turn this hearing which has, I would suggest,
2 enough on its plate into a hearing within itself on the
3 appropriate use of pesticides in general and I mean in
4 detail.

5 MR. CASTRILLI: Mm-hmm.

6 THE CHAIRMAN: Because if that's what we
7 have to do in order to comply with the provisions of
8 the Act, then I suggest we could all easily right now
9 tack on a year to this hearing.

10 MR. CASTRILLI: Mr. Chairman --

11 THE CHAIRMAN: And that's not to say that
12 if that's necessary in our view and it's the only way
13 we can reach or be in a position to reach a satisfactory
14 decision based on our responsibilities and
15 jurisdiction, so be it; we haven't obviously formulated
16 our conclusions resulting from this motion.

17 But I think we want it to be clearly out
18 on the table in front of the parties some of the
19 inherent dangers in terms of process with not coming to
20 reasonable conclusions about the extent of any such
21 investigation.

22 MR. CASTRILLI: Mr. Chairman, I hope you
23 haven't -- if that impression has been left by any of
24 my submissions, I trust it's now clear that that in
25 fact was not the intention.

1 THE CHAIRMAN: Well, we just wanted to
2 make sure because -- well, we want to know what your
3 intentions really were, and I think you have now
4 articulated them to the extent that we are aware of
5 them.

6 MR. CASTRILLI: Thank you. I just have
7 one last matter to deal with and that was in response
8 to Ms. Murphy's comment that the Ministry is not
9 seeking approval for the products themselves.

10 I am not really sure that anything turns
11 on this except that I just want to bring to your
12 attention, Mr. Chairman -- first, if I could ask you to
13 refer to our book -- not our book of authorities, our
14 Statement of Fact and Law.

15 Again at page 2, paragraph 2, which
16 indicates that as part of its timber management
17 activities the proponent is seeking approval from the
18 Board for maintenance operations, and the succeeding
19 paragraph indicates maintenance is involved -- or
20 constitutes tending and protection.

21 And then in discussing tending at
22 paragraph 4 on the same page an indication of the most
23 common tending operation is that which takes place by
24 chemical cleaning and there are other paragraphs to
25 that effect in our statement of facts with respect to

1 protection as well which indicate what the products are
2 that are used in these operations.

3 So that it's clear that you are being
4 asked to approve tending as done by pesticides as an
5 example. Ms. Murphy in her Statement of Fact and Law
6 at paragraph 1, page 3 agrees with all of our facts
7 safe and except paragraph 20 and 26 and 27.

8 So I think the proposition that you dealt
9 with earlier this morning and was dealt with yesterday
10 is that you are indeed in a position to deal with the
11 issue of pesticides and that can include either greater
12 restrictions on use or non-availability of certain
13 products or a whole range as it relates to the issue of
14 tending and protection. And I just wanted that
15 clarified.

16 Subject to any questions you might have,
17 those are my submissions.

18 THE CHAIRMAN: Thank you, Mr. Castrilli.

19 MR. CASTRILLI: Thank you.

20 ---Discussion off the record

21 SCOPING SESSION

22 THE CHAIRMAN: Okay, ladies and
23 gentlemen, we are now going to attempt to embark on the
24 scoping session for Panels 12 and 13. And before we
25 embark on this in detail, the Board would just like to

1 make a couple of preliminary statements.

2 First of all, because of the nature of
3 the evidence being dealt with in both panels, we feel
4 that the panel should really be dealt with together and
5 we feel that this is one of the first of the panels
6 that we have dealt with to date where hopefully this
7 scoping exercise will be able to materially reduce the
8 amount of direct evidence that is necessary because, in
9 our view, there is some duplication in terms of some of
10 the documents being presented and we will go into that
11 in detail sort of document-by-document.

12 Now, with respect to the issues before us
13 for the last two days, what we are suggesting for the
14 purposes of this scoping session is that at this time
15 we leave out of the discussion any scoping with respect
16 to the issues before us, the health effects. And we
17 are also suggesting that we also leave out evidence
18 relating to the mechanics of the federal and provincial
19 regulatory processes because that has all related and
20 tied up with the matters that have been before us for
21 the last two days.

22 And we don't think that the scoping
23 session will be productive with relation to those
24 matters until after we have handed down our ruling
25 and, in view of the complexity of the matters that we

1 have heard, you will not expect to get that ruling for
2 a few days. We will certainly try and be as
3 expeditious as possible.

4 And I might add that we do expect to hand
5 it down in plenty of time for the actual presentation
6 of the evidence itself, because just looking ahead at
7 the timetable, we have really only got two days next
8 week -- I'm sorry, four days next week and then two
9 days in Toronto the week after -- no, sorry, four days
10 next week then the site visit and then two days in
11 Toronto of the week after that and yet we have to
12 complete all of the cross-examinations for Panel 11 and
13 we don't know how long that will take. But we suspect
14 that before we get into 12 and 13, probably a good
15 month will elapse in terms of calendar time.

16 So that we will be able to give some
17 guidance as to where we are going on the topic of
18 health effects prior to that and, if necessary, we will
19 hold a further scoping session with respect to that
20 topic alone, if necessary.

21 Ms. Murphy?

22 MS. MURPHY: Well, I was going to bring
23 to your attention a couple of problems I have with
24 scheduling and I understand your interest in putting
25 the two panels together, it would be terrific if we

1 could.

2 My difficulty -- I have two of them. The
3 first one is that -- and both of them relate to Panel
4 13, okay. If you recall, the list of -- well, the
5 ones -- all right. The witnesses in Panel 13 are Mr.
6 Churcher, Mr. Nicholson, Mr. Isgraf, and Mr. Kingsbury
7 and I have two problems that I wanted to raise with
8 with you today. The first is that Mr. Churcher and Mr.
9 Nicholson are both in June involved in the budworm
10 spraying; that is the time of the year when that takes
11 place. As a matter of fact, in early June I believe
12 they will be -- that will be carried out in Thunder Bay
13 District nearby. That is -- June is the month and they
14 are both involved in this probably. So that was one
15 thing I was concerned about.

16 We suspected if we are going to do Panel
17 12 first we would probably not run into that problem in
18 June. And that as a practical matter, I was going to
19 suggest that if we did run -- if Panel 12 did manage to
20 finish in two weeks, we would be prepared to go ahead
21 with another panel rather than waste any time. So
22 that's the first problem.

23 My second problem is with Mr.
24 Kingsbury -- sorry. Mr. Freidin is doing Panel 14.

25 MR. FREIDIN: I just thank you for that.

1 MS. MURPHY: My other problem is with Mr.
2 Kingsbury. Peter Kingsbury was, until about a year
3 ago, the environmental impact project leader at Forest
4 Pest Management Institute with the federal government
5 and he is the person who will be speaking to that
6 document you are talking about.

7 Well, about one year ago Mr. Kingsbury
8 took early retirement from the federal government and
9 went back to university to become a United Church
10 Minister and what that has meant is that he has been
11 full time at school and I haven't been able to get much
12 access to him. He says he has to learn Greek on top of
13 everything else, so...

14 THE CHAIRMAN: He can come here and
15 testify in all languages.

16 MS. MURPHY: Well, in Greek anyway. At
17 this point, of course, he has finished this year's
18 academic year and he is involved in some other
19 pursuits, but he will be starting his academic year
20 again at the beginning of September and he has -- I
21 mean, to be frank with you, I have brow beaten him into
22 staying involved in this so that we can give you the
23 opportunity to hear him.

24 But I would ask, if we could, if we could
25 schedule him in August so that we can have him

1 completed before he has to return to school and leave
2 this project, except as I said, he said he would be our
3 chaplin.

4 THE CHAIRMAN: And I am not sure whether
5 we would want to issue a subpoena either.

6 MS. MURPHY: So I'm sorry, I mean, those
7 are a couple of practical things and these things
8 happen from time to time but I promised him I would ask
9 the Board for that indulgence and to get him in on his
10 own in August.

11 THE CHAIRMAN: Well, okay. I think what
12 we should do, keeping in mind your comments, is
13 indicate to you what we feel in terms of some of the
14 issues and some of the evidence and then let's see
15 logistically how we might be able to accommodate it and
16 certainly we will want to hear the views of all of the
17 parties as well.

18 We've had the advantages all of you have
19 of reading the statements of issue and the witness
20 statements on them and it seems to us - and have
21 reached not certainly final conclusions because we want
22 to consider your comments - but we have reached some
23 tentative conclusions which we would like to put before
24 you.

25 Firstly, looking at the Panel 12

1 evidence, we think essentially the evidence in that
2 panel is broken down into three basic topics. Firstly,
3 the forestry effects of chemical use, and that is
4 basically dealt with by Mr. Hynard's paper and Mr.
5 Galloway's paper and Mr. Campbell's paper.

6 MS. MURPHY: And Ms. Krishka's paper.

7 THE CHAIRMAN: Sorry, and Mr. Krishkra's
8 paper.

9 MS. MURPHY: Yes. Ms. Krishkra.

10 THE CHAIRMAN: Ms., sorry. The second
11 sort of generic topic are the environmental effects
12 relating to pesticide use, and that is basically dealt
13 with in Document 5 and it is also dealt with in Panel
14 13's evidence in the ESSA Report.

15 MS. MURPHY: Excuse me. The general
16 evidence on the effects of pesticides is actually in
17 Panel 13, it is that one paper.

18 THE CHAIRMAN: Right.

19 MS. MURPHY: The one witness that we
20 brought into Panel 12 to deal with effects of tending
21 is dealing with other effects of tending.

22 THE CHAIRMAN: Okay.

23 MS. MURPHY: So that in fact we tried not
24 to have overlap, we tried to put all of the effects on
25 the pesticides all at once so that it wouldn't flow

1 over.

2 THE CHAIRMAN: Okay. And the third area,
3 which we are not going to get into today, are the
4 health effects, and we would include in that the
5 discussion about the regulatory processes, and also we
6 would suggest it would be appropriate to leave out
7 issues relating to worker exposure as well because
8 that, in effect, are health effects.

9 Now, I suppose we can deal with this
10 separately, the Panel 12 evidence coming first. We are
11 interested in the forestry effects of chemical use and,
12 in particular, the alternatives to pesticide use and
13 information on the benefits to the forest of chemical
14 use.

15 Now, we feel that there is some
16 duplication concerning these topics amongst the three
17 papers, both Mr. Hynard's paper, Mr. Galloway's paper,
18 Mr. Campbell's paper, and all we are suggesting
19 basically is that you keep that in mind so that when
20 the evidence comes in there is not a duplication.

21 We really don't feel it's helpful to have
22 all of the information presented in oral direct from
23 the authors of all of the three papers when they
24 overlap to the extent that they do and obviously, where
25 they don't overlap, are the areas in which you should

1 be spending your time in oral direct.

2 Now, with respect to the environmental
3 effects relating to pesticide use, this Document 5 --

4 MS. MURPHY: Are you looking to Panel 12
5 or 13 at this time?

6 MRS. KOVEN: 12.

7 THE CHAIRMAN: 12.

8 MS. MURPHY: There isn't anything about
9 environmental effects of pesticide use in Panel 12.

10 MRS. KOVEN: It's the effects of tending
11 on the environment.

12 MS. MURPHY: That's right. But it's the
13 effects of the manual and mechanical tending on the
14 environment in that panel, that's Mr. Bus. That's not
15 dealing with the pesticide.

16 Tending involves doing other things as
17 well and that's what Mr. Bus' paper deals with in Panel
18 12 is other, and what we have taken as all of the -- so
19 there wouldn't be overlap, we have taken all of the
20 information about effects and put it all in Panel 13 in
21 terms of pesticides.

22 MRS. KOVEN: In our opinion the Document
23 5 is -- I don't think you should spend much time on
24 that at all. The authors say at the beginning that it
25 is so small in comparison to harvesting that there

1 isn't much --

2 MS. MURPHY: Entirely agreed. As a
3 matter of fact, that was the point. With harvesting we
4 had a witness on aquatics, terrestrial and
5 socio-economic environment and you have that as well
6 now. We looked and we said: At this point dealing
7 with this issue there certainly isn't any point in
8 trying to split it up further. There is really not a
9 whole lot more to say, and I agree with you entirely.
10 In fact, that's why we put one witness and it really
11 adds only a small amount that is specific to tending,
12 but entirely agreed.

13 MRS. KOVEN: We were also a little
14 quizzical about the socio-economic environments. We
15 looked very hard but didn't see any discussion of it.
16 It is in the title but we couldn't find very much of it
17 in the statement.

18 MS. MURPHY: You realize you would be
19 looking for the effects of mechanical and manual
20 tending on the socio-economic environment. I know
21 there are some things, they talk about the people who
22 have jobs doing that.

23 MRS. KOVEN: We were expecting to see
24 another chart with all the stakeholders.

25 MS. MURPHY: Oh. Well, we thought you

1 would have that memorized by now.

2 MRS. KOVEN: Well, we have.

3 MS. MURPHY: No, we didn't do that. I
4 hope you are not disappointed.

5 THE CHAIRMAN: No, we are not. Okay,
6 moving on briefly to Panel 13, and we are looking at
7 the four documents. With respect to the Churcher
8 document, we feel that the important evidence to be
9 adduced from that panel is contained in paragraphs 3 to
10 13 essentially.

11 And in looking at the second paper, Mr.
12 Nicolson's paper, we think that much of what's in the
13 Nicolson paper is also in the Isgraf paper and, in
14 fact, the Isgraph paper is supportive of much of what's
15 in the Nicolson paper.

16 And in reviewing the statements of issues
17 of the other parties, it really appears that the other
18 parties would rather deal with this evidence in terms
19 of the Nicolson paper. And, in that regard, we would
20 suggest that the essential paragraphs are paragraphs
21 21, 22, 23, 25 and 26, although we want to also point
22 out that in paragraphs 25 and 26 there appears to be a
23 long technical explanation about the operating plans
24 and obviously we are interested in parts of it, but we
25 are not necessarily interested in, you know, a repeat

1 of the detail in terms of the technology in those
2 paragraphs.

3 Now, with respect to the Isgraf paper, it
4 may not be necessary, in our view, to really deal with
5 this paper in oral direct. It is before us and it will
6 be considered ultimately, but that paper is really
7 repetitive in terms of the Nicolson paper.

8 MS. MURPHY: That paper was intended to
9 show a real live example. We thought -- as you will
10 see, we are doing this in Panel 15, we'll show you how
11 you go about the planning, but we also wanted to show
12 you an actual example and we thought it would be useful
13 for people to understand the system to have a look at
14 that.

15 THE CHAIRMAN: Okay. Now, with respect
16 to the last document, the ESSA Report and Jones paper,
17 this in our view is probably the essence of the panel's
18 evidence for both panels and, with a possible exception
19 of the forestry effects, particularly in terms of
20 alternatives which aren't really covered very much, if
21 at all, in the ESSA paper.

22 We think it succinctly summarizes most of
23 the critical evidence for both panels and we are aware
24 of the caveats contained in the ESSA document in that
25 it is not meant to deregate from any of the other

1 papers or any of the other evidence put in, but it does
2 summarize it in a form which is easier, frankly, to
3 digest than the numerous issues that are dealt with in
4 the other papers.

5 It is valuable for a number of reasons.
6 The evidence of several of the witnesses in Panels 12
7 and 13 - Campbell, Churcher, Hogg and Krishka - are
8 combined into a summary that provides the basis for an
9 examination of all of the evidence of both panels. The
10 ESSA document has the advantage of having received an
11 external review or some of the evidence contained in
12 that panel has been externally reviewed.

13 The Board is indicating only that the
14 evidence of both panels is perhaps, in our view, best
15 presented or packaged in the ESSA document. It is open
16 to any of the parties to challenge any of the
17 hypotheses or any of the conclusions and the Board is
18 expressing, of course at this point, absolutely no
19 opinion whatsoever on that.

20 We are just saying that in terms of
21 presentation of the evidence, it appears to provide a
22 good summary of what is contained in some of the other
23 papers and if that were presented to the Board in that
24 fashion, the parties would have an ample opportunity to
25 take a run at anything contained in that evidence.

1 Now, some of the witnesses of course that
2 participated in the ESSA study are going to be members
3 of the panel in any event, so all we are saying is, in
4 terms of scoping, that the majority of the time spent
5 in the presentation of the evidence of both panels
6 should probably be directed towards the ESSA document.

7 I think that's essentially all we want to
8 say at this point and we would like to hear the views
9 of some of the other parties.

10 Start with you, Mr. Castrilli.

11 MR. CASTRILLI: Mr. Chairman, I just
12 wanted to clarify one thing.

13 THE CHAIRMAN: By the way, just before
14 you go on, it is clearly understood that the health
15 effects section is left out of this whole discussion
16 and should our ruling result in those issues having to
17 be dealt with in some fashion, then the Board would
18 obviously take into account how that would be
19 accomplished.

20 If it meant dealing with health effects
21 as a separate topic completely at a later stage in the
22 proceedings, or if it meant combining it as part of the
23 this panel's evidence it really depends on (a) what our
24 ruling is, and (b) how expeditiously we can get that
25 ruling out.

1 So having made clear those concerns and
2 comments, we just want to deal basically with the other
3 evidence.

4 MR. CASTRILLI: Thank you. Mr. Chairman,
5 firstly, I wanted a clarification either from yourself
6 or really from Mrs. Murphy, of the four authors of the
7 ESSA document, which one was going to be testifying on
8 the ESSA document?

9 MS. MURPHY: We have been advised that it
10 is Mr. Kingsbury who is going to be testifying on the
11 ESSA document.

12 MR. CASTRILLI: That was my understanding
13 as well.

14 THE CHAIRMAN: I see.

15 MR. CASTRILLI: And he is not an author
16 of the document. But I understand from Ms. Murphy's
17 comments that he can in fact be qualified to deal with
18 all of the contents of the ESSA document; is that
19 right?

20 MS. MURPHY: That's our view, yes.

21 THE CHAIRMAN: Well, we have to accept
22 that at face value at this point.

23 MR. CASTRILLI: There was one other
24 matter, Mr. Chairman, you raised when you were breaking
25 up the panel -- or when you were looking at the two

1 panels together and trying to conceptualize how the
2 evidence might go forward, leaving aside -- completely
3 aside for the moment the issue of health effects.

4 Just going back to your first discussion
5 of environmental effects of chemical use. As I recall
6 the -- I forget the number now, it is either the fourth
7 document or the fifth document in -- it would be Volume
8 II of Panel 12 which deals with manual and mechanical
9 methods, tending from your perception of combining the
10 two panels, where you were planning on suggesting to
11 the proponent that be dealt with, or maybe Ms. Murphy
12 can answer that?

13 THE CHAIRMAN: Where would you suggest in
14 terms of those broad generic categories that I
15 articulated. It's the second document Potential
16 Effects of Tending on the Forest Estate.

17 MS. MURPHY: It is the fifth document I
18 think.

19 THE CHAIRMAN: I'm sorry, right.

20 MS. MURPHY: Potential Effects of
21 Mechanical and Manual Tending on the Aquatic,
22 Terrestrial and Socio-Economic Environment is the
23 document that I believe Mr. Castrilli is referring to.

24 MR. CASTRILLI: (nodding affirmatively)

25 THE CHAIRMAN: And I think what Mr.

1 Castrilli's question was, we divided off the first sort
2 of generic category into the forestry effects of
3 chemical use and you are suggesting that since this
4 isn't chemical use, this is the manual tending...

5 MR. CASTRILLI: Yes, that's correct, it's
6 manual and mechanical.

7 THE CHAIRMAN: And mechanical, it doesn't
8 really fit into that category. So where best would it
9 fit?

10 MS. SWENARCHUK: Mr. Chairman, in
11 addition to that, as I recall there is a paper by Mr.
12 Hynard filed with Panel 12 on financial decision-making
13 and I haven't notice that listed. Are they coming to
14 that later?

15 THE CHAIRMAN: Yes -- no, that's correct.
16 We did note that actually but I forgot to note it to
17 you, that there is a discussion of the economic
18 considerations and that is something that's not dealt
19 with by anybody else in any of the other papers, so
20 that should also be dealt with by Mr. Hynard when he
21 presents his evidence. And that, I think, was within
22 paragraphs 6 to 9 of Mr. Hynard's paper that we
23 indicated should be included.

24 Okay. To answer your question
25 specifically, Mr. Castrilli: The Board feels that all

1 of the forestry effects, including manual, mechanical
2 and chemical could be dealt with in the one sort of
3 generic topic because certainly the manual and
4 mechanical operations could be an alternative to the
5 chemical, the use of chemicals, and both have effects
6 on the forest estate, so I think they can probably be
7 dealt with in the one generic category.

8 MR. CASTRILLI: I'm sorry, Mr. Chairman,
9 before you move on to someone else I just had one
10 question that followed up on that and I didn't want to
11 lose it before -- or really forever.

12 As I recall, I think it's Volume II of
13 Panel 12 has what looks like either a draft or indeed
14 simply is a repeat of what would be Item 2.5 in the
15 ESSA document.

16 THE CHAIRMAN: Sorry, lead us through
17 that again, sorry?

18 MR. CASTRILLI: All right. In Volume II
19 of Panel 12 there is an excerpt, I believe it is, of
20 what I believe actually appears again in the ESSA
21 document.

22 MRS. KOVEN: What are the page numbers?

23 MS. MURPHY: I can help you with that. I
24 don't think you really need to look. The point is
25 this: There is a chapter in the ESSA document that

1 deals with effects of pesticides in particular on the
2 forest estate and that was done in the context of the
3 ESSA exercise.

4 When we wrote and put together the
5 witness statement for Panel 12, one of the witnesses,
6 Ms. Krishka, puts her paper together on the effects of
7 tending on the forest estate, which includes pesticide
8 and other tending, and attaches to that that chapter of
9 the ESSA document. She is one of the authors of that
10 chapter and she attaches it there.

11 So Panel 12, having been completed and
12 sent out before Panel 13, that chapter went out in
13 Panel 12 attached to Ms. Krishka's paper, and she is
14 one of the authors of that part, and then the entire
15 ESSA document went out with Panel 13. Does that help?

16 MR. CASTRILLI: I got that much. I just
17 wanted to know for the purposes of how the evidence
18 will come forward, we are going -- I guess we haven't
19 even settled yet whether the two panels are going to be
20 together, but assuming for the time being that they are
21 going to go forward one at a time, is it my
22 understanding then that we will deal exclusively with
23 the issue of long-term forest productivity in fact
24 in -- and the effects of tending on that, exclusively
25 in Panel 12, and when we come back to the ESSA document

1 in Panel 13 there really will not be anyone to speak to
2 that issue at that time, notwithstanding the fact that
3 the chapter appears in the ESSA document.

4 Can you confirm that?

5 MS. MURPHY: I think that's reasonable,
6 that that part will have already been spoken to by one
7 of the authors and cross-examination will have taken
8 place by one of the authors.

9 THE CHAIRMAN: In Panel 12?

10 MS. MURPHY: In Panel 12. I see the
11 question, I understand the question. It just didn't
12 make sense to rip apart the ESSA document when we --

13 THE CHAIRMAN: Okay. Well, you know,
14 it's our view that the same topics -- the same generic
15 topics should not be covered twice and I don't think
16 there is any intention by anyone to do that.

17 So when we get to Panel 13 and the ESSA
18 document, if it has been covered in 12 it will not then
19 be covered again in 13.

20 MR. CASTRILLI: All right. Just to
21 clarify, what is in Panel 12 is the exact repeat of
22 what is in Panel 13 with respect to that issue, or is
23 the earlier one a draft?

24 MS. MURPHY: I believe it's exactly the
25 same thing, my understanding.

1 MR. CASTRILLI: That's fine.

2 MS. MURPHY: As I recall going back a few
3 months.

4 THE CHAIRMAN: Okay. Thank you.

5 Ms. Cronk?

6 MS. CRONK: Thank you, Mr. Chairman. I
7 was just going to rise on the earlier point and, that
8 is, the suggestion of how to merge the two sections of
9 the effects evidence.

10 As I have been considering, as I heard
11 you, the panel's direction on the three issues in both
12 panels and, really they are all pesticides oriented,
13 different types of effects, but nonetheless focused on
14 pesticides.

15 And from our client's perspective, as you
16 will have seen from our statement of issues, the
17 effects and the advantages and disadvantages of the
18 other tending techniques, chemical use as just being
19 one, the advantages and disadvantages of the other
20 protection techniques, chemical use only being one, are
21 equally important and I wondered if the Board had some
22 direction that you wish to provide as to how you saw
23 that proceeding or will that be left to the discretion
24 of the cross-examiner?

25 I was concerned, recognizing immediately

1 that the importance of focus that is here, it does not
2 address the impact of the other methods available, the
3 other alternatives and perhaps that was...

4 ---Discussion off the record

5 THE CHAIRMAN: Well, it appears from our
6 review of the witness statements that the bulk of the
7 witness statements -- the bulk of the evidence
8 contained in the witness statements deals really with
9 the effect of the pesticides or chemical use.

10 Obviously we are quite aware there are
11 other methods used, mechanical and other methods, and
12 these are alternatives to chemical use, and we are not
13 certainly indicating that relative degrees of
14 importance should be given on one or the other, but
15 they should probably be dealt with to some extent
16 together as they affect the forest estate.

17 MS. CRONK: I see.

18 THE CHAIRMAN: Because they are really
19 alternatives to each other. Would you not agree with
20 that?

21 MS. CRONK: It could certainly be done
22 that way and I understand that, Mr. Chairman. I
23 suppose I was simply rising because, as you will have
24 seen from the statement of issues of our clients,
25 clearly pesticides is a front and centre issue for them

1 and they have some things that they want to try to help
2 you with on that issue.

3 THE CHAIRMAN: Right.

4 MS. CRONK: But having said that, the
5 others are also of equal importance. And I just wanted
6 to know whether you foresaw that they would be dealt
7 with separately or whether it was under the effects
8 umbrella and deal with them all at once.

9 I don't know whether your direction, sir,
10 is intended to relate to evidence-in-chief primarily or
11 whether you are also suggesting a direction for
12 cross-examiners?

13 THE CHAIRMAN: Well, again, because the
14 two panels, frankly, are so intertwined, what we are
15 hoping to do is perhaps be in a position to deal with
16 the broad generic topics and complete them as a unit,
17 so go through the direct evidence and then go through
18 the cross-examinations, seem to us to be a better way
19 to deal with it in terms -- but that assumes it's a
20 combined panel.

21 And if we can't go with a combined panel
22 because logistically we can't do that, then of course
23 what I have just said doesn't apply. So I guess we are
24 going to have to take into account what is possible and
25 what isn't possible.

1 I guess there are two purposes of the
2 scoping session. One is to make sure that the evidence
3 from both panels is not duplicated and repeated, and we
4 have indicated where we think the majority of the time
5 should be spent and on what issues and, unless the rest
6 of the parties present disagree with our evaluation of
7 these two -- of the evidence relating to these two
8 panels, we think that the Ministry should sort of focus
9 upon those areas.

10 The second issue we have to deal with is
11 the logistics of getting this evidence in, and that
12 really depends on (a) whether we can have the panels
13 combined and sit as one, or whether we have to deal
14 with the panels on a separate basis. And if such is
15 the case, then we would go through Panel 12 in direct
16 evidence, cross-examine, re-examination, finish with
17 the panel then move on to 13 in the normal fashion.

18 And I take it what you are saying is, you
19 really don't have a choice, is that basically your
20 position?

21 MS. MURPHY: Certainly not if we reach
22 Panel 12 in early June. That is where we are going to
23 have difficulty and you should realize at this point in
24 time it's impossible to tell when 11 will finish.

25 But if 12 starts in early June, then it

1 isn't just Churcher and Nicholson but also Kingsbury,
2 that is really Panel 13, those three people all have
3 problems between, you know, putting them together until
4 the August time.

5 THE CHAIRMAN: We've only got the rest of
6 June and then we will be off until the second week of
7 August.

8 MS. MURPHY: August, that's right.

9 MS. SWENARCHUK: Mr. Chairman, I think it
10 is reasonable to assume that we will reach Panel 12 in
11 the beginning of June. I don't know whether the Board
12 has heard from OFAH, I'm assuming they don't intend to
13 cross-examine on this panel. As far as we are all
14 aware, there's only the Ministry of Environment, the
15 industry and ourselves who plan to cross-examine.

16 THE CHAIRMAN: You mean on Panel 11?

17 MS. SWENARCHUK: On Panel 11.

18 THE CHAIRMAN: 11.

19 MS. SWENARCHUK: We have half a day
20 tomorrow and half a day next week, but my understanding
21 is that -- MNR can tell us that may be enough time in
22 any event to conclude their case, that leave only the
23 three of us to cross-examine.

24 THE CHAIRMAN: Well, I recall Mr. Mander
25 indicating to me - Mr. Mander you're in the room - that

1 OFAH did make contact with you with respect to the
2 possibility of cross-examining on this panel?

3 MR. MANNING: Yes. They weren't sure.
4 They said they might want to come in. I'm supposed to
5 hear from him tomorrow.

6 MS. SWENARCHUK: What I suggest Mr.
7 Chairman, is that at the latest we are likely to
8 finish - I shouldn't say this - assuming that the three
9 of us that we know about aren't more than about a day
10 each, and even that is an assumption. I think I'm
11 prepared to say that on my part, I won't speak for
12 anyone else.

13 We have several days next week. I will
14 not be available on the Thursday, I will discuss that
15 with Mr. Mander. The hearing hearing days after that
16 are the 1st and 2nd of June. I think it's quite
17 reasonable that we are going to finish Panel 11 around
18 that time or shortly thereafter.

19 That still leaves us in the early part of
20 June for starting the next panel.

21 MS. MURPHY: That is what I was
22 expecting.

23 THE CHAIRMAN: Okay. So who would you
24 present in the early part of June?

25 MS. MURPHY: I would put together Panel

1 12 and let us get them done in June, hopefully get them
2 over with -- finished in June.

3 THE CHAIRMAN: All right. Well, I think
4 based on the reasons why they cannot present, it does
5 seem reasonable to the Board when these people are
6 involved in pesticide use and that is the time of year
7 that they are conducting the spray program, they are
8 probably a better use to the public at large tending to
9 the problems in the forest than perhaps appearing
10 before us.

11 And then again -- I am not sure you
12 should read anything into that comment other than the
13 fact that they do have a job outside of this hearing.

14 MR. MARTEL: It wasn't unanimous.

15 MS. BLASTORAH: Depending on how long
16 they are here, that may not be the case.

17 THE CHAIRMAN: Okay.

18 MS. MURPHY: I only have the one thing I
19 wanted to raise, unless anyone else has something.

20 Just one, and unfortunately there really
21 isn't anyone here, but I think I better advise, the
22 statement of issues from Windigo Tribal Council suggest
23 that they want to ask questions, cross-examine this
24 panel, both of them, on the question: Is there a
25 federal fiduciary duty to ensure that Indian people and

1 Indian lands are not adversely affected by provincial
2 licensing and/or application of pesticides.

3 I can advise that there are no witnesses
4 and counsel does not intend to take any position on
5 whether or not there are federal fiduciary duties in
6 this area.

7 MS. CRONK: I raised the matter with Ms.
8 Murphy at the beginning of the session, sir. I have
9 the same objection on behalf of our clients for perhaps
10 self-evident reasons. It's a complicated legal
11 question and clearly a panel of foresters, no matter
12 how qualified, aren't those that should speak to that
13 kind of issue.

14 THE CHAIRMAN: And they may wish to raise
15 the question if the Ministry comes out with the answer
16 that has just been given by their counsel, that would
17 basically end the matter, I would suggest for this
18 panel.

19 Now, is there anything further then in
20 terms of the scoping session at this point?

21 (no response)

22 Very well.

23 We do feel that as a result of this
24 particular session we should be able to expeditiously
25 go through the evidence for both panels and hopefully

1 we have been able to accomplish some degree of focus in
2 terms of the issues that both the Board sees as
3 relevant and the other parties.

4 I just wanted to add as well that the
5 Board, in formulating its ruling on the matters dealt
6 with yesterday and today, will of course be considering
7 the submissions made by Mr. Hunter for which has been
8 filed and, as you are aware, he wasn't here to address
9 those issues orally, but they are before us and we will
10 be considering those as well.

11 MS. BLASTORAH: Mr. Chairman, if that is
12 all on the scoping, I would just like to ask one
13 question. I have all of Panel 11 sitting back here
14 trying to determine whether they are going to be
15 required today, and I think they have other things they
16 could be doing perhaps productively than listening to
17 us.

18 It's already 3:15 and I think we still
19 have one more matter to deal with.

20 THE CHAIRMAN: Right.

21 MS. BLASTORAH: So perhaps...

22 THE CHAIRMAN: No, I think that's a fair
23 question. The Board will take a 20 minute break, we
24 will come back and deal with the community visit
25 question, and I think we will adjourn for the day.

1 MS. BLASTORAH: And just further to that,
2 perhaps if we could get some idea of when Panel 12 or
3 whatever is likely to start. I think if we get to sit
4 tomorrow until perhaps two o'clock, I think the Board
5 indicated, tomorrow.

6 THE CHAIRMAN: Yes.

7 MS. BLASTORAH: I can pretty well
8 guarantee we will get through Mr. Elliott and Mr. Baker
9 tomorrow and I think, based on that, we can indicate
10 that we will be able to finish evidence-in-chief on
11 Monday and start cross on Tuesday.

12 And given the comments today from Ms.
13 Swenarchuk and she had indicated that to me previously,
14 that she couldn't make any guarantees of course, but
15 she expected to be about a day.

16 Perhaps if we could get an indication
17 from the other parties as to whether they can give any
18 indication how long they expect to be that would be
19 helpful.

20 THE CHAIRMAN: All right. Ms. Cronk, do
21 you have an idea for your side?

22 MS. CRONK: I hope to be less than half a
23 day, sir.

24 THE CHAIRMAN: Very well. Mr. Campbell,
25 or Ms. Seaborn?

1 MS. SEABORN: Half a day, Mr. Chairman.

2 THE CHAIRMAN: Half a day.

3 MS. BLASTORAH: In that case, there's a
4 good chance we could finish next week, Mr. Chairman.

5 THE CHAIRMAN: Right. And we will be
6 pressing OFAH to indicate to us clearly tomorrow
7 whether they are going to be cross-examining.

8 MS. BLASTORAH: And perhaps I could just
9 take this opportunity. I have been reminded or asked
10 to remind the people present that there is the one year
11 anniversary party tonight in Salon E at seven o'clock,
12 everyone invited.

13 THE CHAIRMAN: Okay. If we do finish
14 when you have indicated, Ms. Blastorah, then it looks
15 like we would be starting the next panel in Toronto.

16 MS. BLASTORAH: That would appear to be
17 the case, Mr. Chairman. Now, that may be a problem
18 because we don't yet know apparently which panel that
19 is going to be.

20 MS. CRONK: Well, you do know, you know
21 it will be 12.

22 THE CHAIRMAN: I think it will be 12.

23 MS. BLASTORAH: Starting into 12. It
24 appears then that we will be starting 12 in Toronto on
25 the 1st of June.

1 THE CHAIRMAN: Okay.

2 Very well, we will adjourn for 20
3 minutes.

4 ---Recess taken at 3:20 p.m.

5 ---On resuming at 3:40 p.m.

6 THE CHAIRMAN: Thank you. Be seated,
7 please.

8 Ms. Murphy?

9 MS. MURPHY: Local Hearings. Okay. A
10 couple of weeks ago Mr. Mander advised that the Board
11 was interested in looking into the possibility --

12 MS. SWENARCHUK: The mike is not on.

13 MS. MURPHY: I'm sorry. Oh.

14 I'm sure you heard that much.

15 The Board was looking into the
16 possibility of commencing the local hearings and I
17 suggested actually I come over and speak to him about
18 some of the details about how we might go about that.
19 I have, as you can appreciate, been thinking about what
20 the details would be for a long time.

21 As I understood it, what the Board was
22 interested in doing was attempting -- either September
23 or October, attempting to try one or more of the local
24 hearings and to just basically see how they are going
25 to work and get an opportunity to learn as we go I

1 suppose and find out how we can go about it.

2 I spoke to him at that time about a
3 number of factors --

4 THE CHAIRMAN: There was another basic
5 purpose for that, Ms. Murphy, and that was the Board's
6 feeling that the public at large should not be left to
7 the very end of these proceedings before they have an
8 opportunity to address the Board. And we felt that in
9 view of the very lengthy proceedings we are involved
10 with, that will be months away, so perhaps it would be
11 better to at least have some public participation at the
12 local level at an earlier stage.

13 MR. MURPHY: Mm-hmm.

14 THE CHAIRMAN: As well the purposes you
15 suggest are very valid also.

16 MS. MURPHY: Yes. I think we are going
17 to be doing something that actually hasn't been done
18 before, especially at this scale, and when I first
19 spoke to him I suggested that we look at trying one and
20 not look at trying to set up more than one at this
21 point in time and attempt to talk through what some of
22 the practical and procedural problems might be.

23 But my suggestion is that to the extent
24 possible we should keep it simple, given that it could
25 be quite an exercise.

1 I am going to try and be quick because I
2 wanted to point out a couple of the matters that I
3 think we have to deal with and I don't think all of
4 them can be resolved certainly at this time and I'm
5 sure my friends might have some things to say about it.

6 Some of the things that have to be looked
7 at are the notice problems, how much time will be
8 needed to give adequate notice and how you go about
9 doing it, what kind of newspapers and so forth. Those
10 are issues that we will have to work out.

11 What's important is what details would be
12 required in the notice because, again, you have to
13 determine what kinds of information you can give to
14 people in a notice and that would, of course, be things
15 like date, place and so forth but, of course, it would
16 also have to advise people of the subject matter of
17 what was going on at that time so that they would know
18 what to expect.

19 The other details that we have to discuss
20 and think about are things like what kinds of support
21 would be required at local hearings and that, of
22 course, includes looking at a continuum of things; do
23 we need only the people, you know, the individuals that
24 have to be there, and the reporters all the way up to:
25 Do we need all of the documentation or somewhere

1 inbetween, and those are some things we have to deal
2 with.

3 Of course, you made the comment earlier
4 that you would like us to look after some of those
5 arrangements and so we have to look into those things
6 as well. And I think what we need there will be driven
7 by what we are going to do there.

8 We would have to think about how long you
9 would have to be in any particular place and that is
10 going to take a little bit of crystal ball gazing to
11 some extent. It will be driven, of course, by what is
12 going to happen there. And, in addition, as I
13 understand it, often in these sorts of matters you look
14 at having evening hearings or times when people have
15 access to the Board. So those are some other things we
16 would have to consider.

17 Obviously there will be people who will
18 be able to come in the daytime hours, there are others
19 who will not be able to do that and would want to come
20 at other hours and I think those are things that you
21 are aware we would have to consider.

22 Another matter we discussed is where the
23 first visit would be. The difficulty of course is that
24 we know that in some locations there are some people
25 who intend to lead evidence that have already advised

1 who are full-time parties and, of course, it would
2 probably not be wise to use one of those locations for
3 the first visit. First of all, I would imagine that
4 the people who are planning to do that wouldn't be
5 prepared to go ahead and, secondly, I think there would
6 be a real problem asking people to do that before our
7 case is in. And this is something I am concerned
8 about.

9 THE CHAIRMAN: Well, it's certainly the
10 Board's intention - I think we alluded to this in our
11 early suggestion about this - that we would want to
12 pick a place where we know that there is not a
13 full-time party that wants to make a presentation
14 because of some of the problems that you have
15 suggested.

16 We really want one of the locations where
17 essentially, at least to the best of our knowledge, the
18 only parties that want to address the Board are members
19 of the public, and I would include essentially the
20 local public in and around that location, wherever it
21 is, one of the 14 locations that we have already
22 chosen. And the majority of those presentations would
23 be probably of a brief nature, it may be by way of
24 submission to the Board, either written or oral.

25 It may just be as we suspect and our

1 experience indicates to us, members of the public that
2 want clarification of certain aspects of your
3 application.

4 We would probably want to sit for a day
5 session as well as an evening session. If it turned
6 out that the numbers that showed up were such that a
7 subsequent session were deemed appropriate, we would
8 probably extend it. And, again, it's been our
9 experience - and, you know, it's not a new thing for
10 the Environmental Assessment Board to hold these types
11 of sessions - in other cases, it's been our experience
12 that a great number, depending on the application, may
13 show up, many of them individually do not take up more
14 than 10 or 15 minutes before the Board in making their
15 presentations or asking their questions and you can
16 usually accommodate a fair number of people in one
17 session. And it's only been my experience on two or
18 three occasions that we've had to extend it to a second
19 sitting. And this is the type of thing.

20 Now, we are like you, we don't know in
21 terms of this particular application until we get
22 there.

23 MS. MURPHY: Mm-hmm.

24 THE CHAIRMAN: And we may all be very
25 surprised in terms of either the avid interest that's

1 out there or the total lack of interest that may be out
2 there. We don't know.

3 MS. MURPHY: That's true. Following from
4 the comment that I was a bit concerned about people
5 putting in submissions before our case is complete.
6 One thing that I would suggest we take great care to do
7 is, if we are going to do this before our case is
8 complete, that if people are going to come and make
9 submissions they should be advised that they can
10 supplement those at a later time so that they don't
11 have the situation of later on saying they made their
12 submissions before our case was in.

13 THE CHAIRMAN: Yes.

14 MS. MURPHY: I think, you know, we do
15 want to take care of the natural justice aspect.

16 THE CHAIRMAN: Yes. There's absolutely
17 no doubt, we would ensure that they do have that
18 further opportunity.

19 MS. MURPHY: Those were some of the
20 procedural matters we talked about. And then, as you
21 are aware, I think Mr. Mander advised that the Board
22 was considering asking us to bring witnesses to answer
23 questions and, to be frank, I was a little taken aback
24 by the suggestion and I'm going to tell you -- I'm
25 going to tell you why I'm not--

1 THE CHAIRMAN: Super keen?

2 MS. MURPHY: --super keen. I'm going to
3 tell you what I think the problems are, I'm going to
4 tell you what I think may be a solution is, if I
5 understand the problem you are trying to solve.

6 I'm afraid you are going to be a little
7 annoyed with me, but I think I better tell you about
8 this. And, first of all, I can understand what - sort
9 of the way I put it - what problem you are trying to
10 solve. As I understand it, it's your view that some of
11 the people who come to this part of the hearing, which
12 is what it is, it's a formal part of the hearing, may
13 be coming for the purpose of obtaining more
14 information. And that being the case, it's your view
15 that there should be a way for them to obtain that
16 information.

17 And I would suggest that there are a
18 number of ways that we can work that out, but I would
19 suggest that it's probably not the best idea to attempt
20 to work that out by creating a new panel and having a
21 panel sitting in front of the Board being in effect
22 subject to continuing cross-examination, which is what
23 it would be.

24 You have to bear in mind, this is a
25 formal part of the hearing, you do have the Board, you

1 do have reporters, you do have witnesses and people
2 asking questions of the witnesses is cross-examination.

3 And I think the first thing that - and I
4 would like to hear from my friends on this - but I
5 think the first thing that one should consider is that
6 if we have -- it is in fact an opportunity for us, as
7 much as anything else, if we have an opportunity to
8 have people who have already been cross-examined and
9 re-examined put up to, in effect, discuss the same
10 matters our friends will not have had an opportunity to
11 re-examine those witnesses on things that they
12 subsequently say more about at that hearing, at that
13 continuation of the hearing. And I think that is
14 something I will leave to them, but I think it is a
15 legitimate concern.

16 And secondly, as I say, if we are dealing
17 with people who have already put in their evidence and
18 have already been cross-examined, and I am concerned
19 that if we do that in -- if we continue that in the
20 formal process what you actually have is continuing
21 cross-examination. And another part of the problem is
22 that --

23 THE CHAIRMAN: What are you afraid of,
24 you are going to change your story?

25 MS. MURPHY: I'm not afraid of that, no.

1 I'm just saying that my friends might be afraid of
2 that. For me, my concern is that I would have to
3 constitute in effect a new panel, no one has notice of
4 what this panel would be talking about, they would --
5 I'm not entirely sure what the subject matter of what
6 this panel would be asked questions about would be. I
7 think no matter how we constitute the panel, they will
8 end up having to say: Well, I didn't talk about that,
9 you will have to look at the transcript here or
10 something like that. Those are things that, you know,
11 that could occur.

12 For the Board the problem is that what
13 you are -- I think what you do in location No. 1 you
14 will have to do in all of the other locations, and that
15 would mean for the Board hearing this basic information
16 14 times.

17 THE CHAIRMAN: But is it not providing a
18 useful opportunity for the public at large who do not
19 have an opportunity to present themselves in Thunder
20 Bay, either on a regular or sporadic basis, to find out
21 some further information about an undertaking that will
22 ultimately affect them in terms of its impact resulting
23 from a decision of this Board?

24 The whole idea of this exercise is to
25 constitute a proceeding which is open to the public at

1 large and, because of the nature of this undertaking
2 spread across the province, it's just not possible,
3 practical, feasible for many members of the public to
4 do anything, frankly, other than read the media
5 accounts and those who wish to avail themselves of the
6 opportunity read the transcripts.

7 And it's our strong view that they should
8 be entitled to some kind of access that is more than
9 just making a presentation.

10 MS. MURPHY: Mm-hmm.

11 THE CHAIRMAN: Because most of these
12 parties who constitute members of the local public if
13 they wanted to make major presentations they would be a
14 full-time party or a party that is participating on a
15 larger scale.

16 What we are contemplating with one of
17 these community hearings in effect is an opportunity
18 for members of the public at large to probably clarify
19 some of their concerns and how do you go about doing
20 that. We can't give the evidence, you can't give it as
21 counsel, we really feel that they should have the
22 opportunity to ask somebody.

23 MS. MURPHY: But what you are
24 contemplating there then is that witnesses would be
25 giving evidence.

1 THE CHAIRMAN: Witnesses would be in
2 effect I suppose giving evidence, if you want to take
3 it in a formal sense.

4 MS. MURPHY: Mm-hmm.

5 THE CHAIRMAN: What the Board has
6 difficulty in agreeing with you on is how you are going
7 to be substantially prejudiced and, in the event that
8 something arose, Ms. Murphy, wherein the Board felt you
9 were substantially prejudiced, we think we have enough
10 flexibility in our procedural jurisdiction to remedy
11 that.

12 If necessary, we will offer an additional
13 opportunity for other parties or yourself to rectify
14 what you perceive to be a great injustice if it occurs.
15 I would be awfully surprised if in fact it did.

16 MS. MURPHY: Well, fair enough. I just
17 would ask the Board to consider that we are not
18 objecting to bringing people along to answer questions,
19 that's not a problem and we can do that. My concern is
20 having that as part of the formal record of the process
21 because this is part of the hearing and it was that
22 aspect of it that did cause me some concern.

23 THE CHAIRMAN: All right. So your
24 suggestion then is that this panel would answer
25 questions, but that it would not constitute part of the

1 record?

2 MS. MURPHY: I think that is one way to
3 resolve the problem because we don't have an objection
4 to taking people along, our concern is that this
5 constitutes part of the process, part of the hearing
6 and part of the evidence and that may cause
7 difficulties.

8 THE CHAIRMAN: Okay.

9 MS. MURPHY: So it's that we would like
10 to consider.

11 THE CHAIRMAN: All right. Okay. Well,
12 you know, you are dealing with what you consider to be
13 a substantive issue in this whole community hearing
14 question.

15 So let's hear just on that point, if we
16 might, at this point from some of the other parties.

17 Ms. Swenarchuk?

18 MS. SWENARCHUK: Well, I'm pleased to
19 hear that the Ministry is not objecting to have people
20 present to answer questions.

21 I'm speculating as much as anyone else in
22 thinking about how this might develop, but I would
23 expect, as you have said, that local people will come
24 both to make submissions to the Board and to ask
25 questions.

1 I think that the appropriate individuals
2 to be present from the Ministry would be both a
3 selection of senior managers who could answer questions
4 at the policy level and probably local Ministry people
5 who would have knowledge of some of the local issues
6 about which questions might be asked.

7 I think that the proceedings must be part
8 of the overall record of the environmental assessment,
9 to make it otherwise is of course to prejudice the
10 local people who have participated. To suggest that in
11 some way because they weren't able to do it with a
12 lawyer in this room, what they have to offer to the
13 Board doesn't have as much weight and doesn't become
14 part of this public record as does everything else, I
15 think that is an element of unfairness that really
16 should not be introduced into these hearings.

17 And I think that, frankly, if you were to
18 take that suggestion, then I think you would be
19 obligated to tell people right off the mark when you
20 arrived: Thank you for your submissions, but they are
21 not part of the record.

22 MS. MURPHY: I wasn't suggesting that
23 their submissions would not be part of the record.

24 THE CHAIRMAN: No, the questioning of the
25 panel?

1 MS. MURPHY: Right.

2 MS. SWENARCHUK: All right. In my
3 submission, everything that occurs there must be as
4 much a part of the record as what occurs here, and if
5 it is not, the local people have been prejudiced.

6 However it is to be delineated, I think
7 you would have to begin the evening by establishing
8 that and I would expect a fair degree of resentment and
9 I suggest justifiable resentment in the community.

10 THE CHAIRMAN: Well, one of the major
11 purposes for us suggesting this in the first place is
12 so that the local public, in terms of the length of the
13 proceedings, will not consider themselves as second
14 class citizens--

15 MS. SWENARCHUK: Exactly.

16 THE CHAIRMAN: --in this proceeding.

17 MS. SWENARCHUK: Exactly.

18 THE CHAIRMAN: Because they can't attend
19 here regularly they are left to the end and, as you may
20 suggest, their contribution is not all on the record
21 and somehow is in a lesser category than the rest of
22 the evidence on the record.

23 MS. SWENARCHUK: Exactly. Now, just one
24 more point. You may want to go on to other issues, but
25 with respect to locations, you have said that you don't

1 think it should be one of the locations at which a
2 full-time party will be presenting evidence. I agree
3 with that.

4 I wonder though if you have considered
5 the locations of some of the 50 parties who are
6 part-time parties here and to what extent those
7 peoples' geographic locations would enter into this.

8 Now, if you are going to one of the 14
9 locations, you simply go to one of those 14 locations
10 at which no full-time party is going to present
11 evidence, is that the...

12 THE CHAIRMAN: Well, for instance, we --

13 MS. SWENARCHUK: Because, for example, I
14 can think of several other part-time parties who, I
15 would expect, would present evidence but not, you know,
16 not here and not in Toronto.

17 THE CHAIRMAN: As an example, we wouldn't
18 want to go to Sioux Lookout because we know that Mr.
19 Hunter is intending to present his case in Sioux
20 Lookout. That will take "x" number of weeks.

21 We would not, I think, want to go to
22 North Bay because we I think have an indication that
23 Northwatch or--

24 MS. SWENARCHUK: Or the Temagami group.

25 THE CHAIRMAN: --one of the groups

1 intends to make a fairly substantial submission there.

2 MS. SWENARCHUK: Right.

3 THE CHAIRMAN: Granted the 50 parties on
4 the parties list are probably dispersed amongst most of
5 14 locations. But we are hoping to be able to pick one
6 where we -- perhaps Mr. Mander, by contacting some of
7 those parties, can get an indication of the extent of
8 what their submission might be in terms of time.

9 And if we have to spend three or four
10 days in a location, at least the first one, that's
11 fine. We don't want to sort of break up the
12 proponent's case and suddenly go to one of these
13 locations and end up being there for a month. We don't
14 think it is fair to the proponent to split it in that
15 way and that's not the purpose of this first foray.

16 MS. SWENARCHUK: Okay. That's all I have
17 to say on this question. I may have more to say as
18 other issues come up.

19 THE CHAIRMAN: Mr. Campbell?

20 MR. CAMPBELL: Thank you, Mr. Chairman.
21 I don't think we take any position on what's absolutely
22 right and absolutely wrong in this situation. I am not
23 sure that it can quite be classified into those
24 categories.

25 I think it is a fair concern though to

1 worry a bit about what happens if an MNR panel appears
2 to answer questions on the record in the course of one
3 of these local proceedings. It will, for at least all
4 of the full-time parties, for reasons that have nothing
5 to do with whether they are going to change their story
6 or not change the story, but just because we are all
7 going to be cautious about what -- about paying
8 attention to what any MNR witness says, so that it is
9 going to mean that they have to be approached in a
10 slightly different way than if that was not the case.

11 And I don't mean that in any
12 complimentary or uncomplimentary way, it is just a fact
13 of life. As I say, we don't take any particular
14 position on it.

15 I thought it might though be worthwhile
16 just to mention that in the course of acting on a
17 variety of Hydro matters where this kind of thing goes
18 on all the time, the hearings are regularly moved for
19 specific purposes to specific locations and often just
20 to facilitate local involvement in those hearings, and
21 just to give you the benefit of what my experience has
22 been in those situations.

23 And I think it's fair to say that what
24 Ontario Hydro and the parties to those hearings found
25 most satisfactory when there was that kind of special

1 local hearing was a situation where -- that responded
2 well and made it as convenient as possible for members
3 of the local community to make presentations to the
4 Board, and our observation has been that that's
5 primarily what they want to do; they want to come and
6 talk to you.

7 THE CHAIRMAN: But I --

8 MR. CAMPBELL: The proponent, to some
9 degree, is of less interest to them. And that just in
10 terms of running that kind of a situation, what we
11 found worked well was to maximize the opportunity for
12 members of the local community to speak to you.

13 I and other people who from time to time
14 were acting at those hearings as counsel for Ontario
15 Hydro would often deal with questions of what had been
16 the evidence on this matter to date, and they are
17 responsibilities that rest on counsel when they are
18 answering those kinds of questions, and we would have
19 available knowledgeable people who could speak and very
20 often, I mean, somebody would stand up and say: Well,
21 I want to know something about this, and right in the
22 course of the hearing they would be introduced and they
23 would go off and deal with it, deal with a particular
24 question, deal with an explanation of what the evidence
25 was, what the evidence was likely to be, how we planned

1 to deal with a particular problem, and so on.

2 And very often what we found is that that
3 was a far more responsive way to deal with a concern
4 that was being raised by a member of the local
5 community than requiring them to do it in a formal
6 hearing setting, no matter how cautious one is about
7 trying not to make that intimidating.

8 Now, I don't either urge that upon you or
9 not, but I did think it might be worthwhile just to
10 pass on the benefit of that experience because there
11 have been a whole lot of different ways tried for
12 dealing with this.

13 I have been involved in a whole lot of
14 different ways of dealing with it and on balance that
15 has seemed to us to be a way that works well, responds
16 well to the requirements of addressing what the local
17 community is there to do and find out and, at the same
18 time, avoiding some of the more technical problems
19 which are in the end very real problems that have to be
20 considered when setting up a structure of this type.

21 THE CHAIRMAN: Well, thank you, Mr.
22 Campbell. The only thing I would add to what you have
23 said is, is that this particular undertaking may be
24 somewhat different; different in the sense that it is
25 not as focused as a lot of other proceedings in terms

1 of a particular facility or a particular location of
2 something.

3 MR. CAMPBELL: No, and my remarks are not
4 given -- my remarks, Mr. Chairman, are not given simply
5 in the cases where there has been approval of
6 facilities.

7 In fact, many of the different ways that
8 we have tried to deal with this were tested, if you
9 will, over the course of a five-year Royal Commission
10 Inquiry and hearings into the general topic of electric
11 power planning throughout Ontario, and I will tell
12 there were -- we tried every way you can possibly think
13 of --

14 THE CHAIRMAN: And what was your
15 experience when questions were addressed to counsel and
16 counsel indicated how the evidence was dealt with in
17 the past and other parties didn't agree with counsel's
18 recollection?

19 MR. CAMPBELL: We would -- I guess I
20 didn't ever have the situation where anybody took
21 violent objection to what I said. So I can't sort of
22 answer that.

23 THE CHAIRMAN: Your recollection may be
24 better than some counsel. I mean, it is always a
25 problem. I mean, it is just as much a problem when

1 counsel tries to sum up what the evidence is and is
2 presenting it, in effect, to members of the public.

3 MR. CAMPBELL: Well, Mr. Chairman, I
4 don't disagree with that, but you have got that problem
5 no matter how you do it. You either hand that problem
6 to five or six on a witness panel who may or may not
7 have been there for the whole course of the hearing --
8 in fact, I doubt there are any witnesses who have been
9 here for the whole course of the hearing.

10 And our experience has been -- as I say,
11 that having counsel do it, bearing in mind the
12 responsibilities of providing or pointing out that kind
13 of information, bearing in mind those responsibilities,
14 my experience was the Board is a pretty vigilant
15 watchdog on these kinds of things and certainly the
16 members of the commission certainly were never loath to
17 say: Remember, Mr. Campbell, somebody else had
18 something to say about that.

19 I mean, that kind of thing happens. That
20 in order to get the full breadth of the case, the only
21 way you can do it is through counsel because none of
22 the witnesses have been there all the way through.

23 MR. MARTEL: Was it your experience that
24 much of went on at your hearings, aside from formal
25 presentations with respect to maybe economic effects,

1 that the local people in fact were primarily concerned
2 how a project would affect their community, whether it
3 was jobs, whether it was -- if it was a transmission
4 line and so on, that they were looking for answers?

5 MR. CAMPBELL: On the facility hearings,
6 in most cases - I have to give you a little bit of
7 background - in most cases there had been an extensive
8 public involvement program leading up to the
9 application and really many parts of the application
10 were based on that.

11 So generally speaking, in the facility
12 locations, we experienced the same thing that we
13 experienced on the Commission Inquiry which was, but by
14 that time, yes, they knew where the line was proposed,
15 they knew there were some alternatives, they were there
16 either to tell the Board that they didn't want this
17 line anywhere near them for the following excellent
18 reasons, or that in the evaluation, inappropriate
19 weight had been given to this or that, or they wanted
20 it here or there or whatever.

21 But it was sure clear that what they
22 wanted to do was tell the Board something and they
23 weren't real interested in telling my client, Ontario
24 Hydro, at that time very much.

25 THE CHAIRMAN: What do you, Mr. Campbell,

1 when somebody asks a question like: How does the
2 Ministry go about deciding how to harvest a particular
3 tract of forest?

4 MR. CAMPBELL: You answer the question as
5 briefly as you can and probably -- I mean, the way I
6 would try to answer a question like that would be to
7 point that there is process for making that decision.
8 It is described in some of the exhibits, but basically
9 we try to, you know, we publish notices, we make up a
10 plan, da-da-da-da-da.

11 THE CHAIRMAN: No, no, but would you be
12 giving that evidence as the counsel?

13 MR. CAMPBELL: I would be --

14 THE CHAIRMAN: If I were a member of the
15 public asking you the question at one of these
16 sessions.

17 MR. CAMPBELL: Sure. I would be advising
18 as to what the evidence was on that matter.

19 THE CHAIRMAN: I see.

20 MR. CAMPBELL: Or what the evidence was
21 intended to be on that matter.

22 MR. MARTEL: But aren't you going to get
23 involved -- the problem is that you are going to have
24 local conditions in each of these communities and they
25 are going to differ.

1 Would you not be better off if you had
2 three or four senior people - I just throw a name out -
3 like someone like Armson who knew a lot about
4 harvesting but, at the same time, have the local
5 forester or the local biologist because they are going
6 to be concerned in many of those communities with
7 things that affect them directly in the area they live
8 in and the possible ramifications if they don't get an
9 approval and what it does to their community?

10 So they are going to want to know those
11 sorts of things; are they not?

12 MR. CAMPBELL: But I mean, if they are
13 asking questions about exactly how things are going to
14 be done, and far be it for me to answer this question--

15 MR. MARTEL: That's right.

16 MR. CAMPBELL: --because I am not acting
17 for MNR, but I would expect if I was MNR's counsel, I
18 would be -- the first thing I would point out is:

19 Look, I can't tell you, nor can anybody
20 else in the room, nor can Mr. Armson or the local
21 people tell you exactly how the forest decisions are
22 going to be made four years from now, five years from
23 now. We can tell you what we are doing right now
24 maybe, but that's not what this hearing is about.

25 MR. MARTEL: Well, wait a minute. If you

1 are talking about how you are going to mitigate
2 something, a certain creek or a culvert and a culvert
3 isn't big enough or something like that, the local
4 people from MNR are going to have the knowledge how
5 that's going to be dealt with.

6 MR. CAMPBELL: All right. But that --
7 Mr. Martel, that's just the kind of question that some
8 of the parties are going to have quite a definite
9 interest in. For instance, my client has a real
10 definite interest on how culverts and roads are dealt
11 with and if we are going to have somebody up there who
12 is giving evidence on this matter in advance of Panel
13 14, I'm telling you we are going to be there and we are
14 not going to -- and I don't think it is fair to let
15 that evidence sit in front of you without some
16 cross-examination on it before it comes back to you in
17 Panel 14.

18 And there is a whole nest of little
19 problems that start building up here. And I think
20 that's really why I am just suggesting that there is an
21 alternative way of dealing with it.

22 And the local problem, what we used to do
23 in that situation, there was a local problem, a very
24 particular -- we had all those people there - as I say,
25 looking back at the experience Hydro experience - we

1 had all those people there and if there was a very
2 particular local problem, you would say: All right,
3 you know, Mr. so and so, you stand up, you Mr. so and
4 so meet Mr. so and so, he will tell you all about it.
5 Thanks.

6 And it worked out very satisfactorily.
7 They got to talk right to the guy who knew it, they got
8 to talk to him, not in a formal hearing setting which
9 is very intimidating, and if there had been a
10 particular problem they got their problem solved 99
11 times out of 100, and it was very satisfactory.

12 THE CHAIRMAN: All right. So what you
13 are suggesting, Mr. Campbell, is to have all the
14 counsel available -- well, sorry, counsel for MNR
15 available and witnesses available in terms of the local
16 situation and perhaps some senior people from the
17 Ministry that could address some of these problems in a
18 manner outside of the formal questioning?

19 MR. CAMPBELL: Mm-hmm. All I am saying
20 is that that is a way of doing it that our experience
21 was: Worked very well, it responded well to the
22 requirements of the local community, and I don't think
23 it made anybody feel like any kind of a second class
24 citizen in front of the hearing panel.

25 I am just offering you the benefit of

1 that experience, it seemed to work well.

2 THE CHAIRMAN: Well, we will take it into
3 consideration because, you know, our purpose in
4 suggesting this whole community process is to make sure
5 that the local public have some access to the Board in
6 terms of presenting their own concerns, and also in
7 terms of clarifying some of their concerns.

8 MR. CAMPBELL: Sure.

9 THE CHAIRMAN: We want to do it in a way
10 that we are coming to them because they can't come to
11 us.

12 MR. CAMPBELL: Well, I agree with that a
13 hundred per cent and the worst possible thing that can
14 happen is if everybody goes away from those sessions
15 frustrated and upset.

16 THE CHAIRMAN: That's right.

17 MR. CAMPBELL: That's not in anybody's
18 interest and --

19 THE CHAIRMAN: And I have been at
20 proceedings and presided over proceedings where there
21 was nobody available, other than the Board, and the
22 questions are put to the Board and we can't start
23 giving evidence or rendering opinions on evidence that
24 we have heard, and basically the reply has had to be in
25 those circumstances:

1 We're sorry, Mr. so and so, we can't
2 answer that question, you will have to come to the
3 daytime session and put your question in the formal
4 context. And, of course, they go away saying: We
5 can't show up at the daytime session, we work, what's
6 the good of this hearing.

7 This is the type of thing that we are
8 trying to avoid, especially in a hearing this complex
9 and this far reaching.

10 MR. CAMPBELL: Sure, that's right. And
11 we found a very effective way of doing that was when a
12 particular local concern -- we would have somebody
13 there with local knowledge and, as I say, we do the
14 introduction, that problem would be dealt with.

15 MR. MARTEL: But that wouldn't be put on
16 the record then? I mean, the ultimate discussion
17 between the two people let's say that you introduced?

18 MR. CAMPBELL: No, although there were
19 occasions when, for instance, the kind of thing we
20 would occasionally run into - let me think of
21 something - somebody says that the line is causing
22 the -- the line went up and they had some radio
23 interference. Well, I would introduce them to my guy
24 and I'd say: We will go and find out about this and we
25 will report back to the Board what it was.

1 I can remember one occasion, I mean we
2 sent out the little truck that measures all this stuff
3 to their house and over the next week or so and we came
4 back and we reported to the Board that a particular
5 matter had been dealt with in a particular way.

6 I mean, you can deal with these things a
7 lot of different ways, but you do have to be
8 immediately responsive to the questions of the people
9 there because otherwise it is very frustrating.

10 You do have to bear in mind that some of
11 these apparently legalistic concerns are really quite
12 important to the parties. There are important things
13 that get talked about and the members of public ask
14 very smart questions. The answers are going to be
15 really interesting to some of the parties in the
16 hearing if it proceeded that way, and then you are
17 really moving the whole hearing and I am not quite sure
18 just how you work out that balance.

19 THE CHAIRMAN: Well, you know, it is our
20 intention right from day one, we are not repeating the
21 whole case at 14 locations.

22 MR. CAMPBELL: Well, that's...

23 THE CHAIRMAN: No, we realize that, but
24 we have got to strike this fine balance. All of the
25 other submissions of course would be on the record, the

1 formal submissions, if they are going to be presenting
2 something to the Board by way of a position.

3 MR. CAMPBELL: I see.

4 MR. MARTEL: I still have a worry. I'm
5 sorry to pursue this, but I have a worry that there
6 will be a perception, the public in these small
7 communities, their livelihood depends on the outcome of
8 this decision and to try to tell them to go off in the
9 corner and talk to someone else with no formal
10 response -- I mean, I'm just wondering, is it
11 impossible for various solicitors representing various
12 clients if they couldn't keep their powder dry for a
13 change and listen, and if there is something that is
14 really going to prejudice their client, fine to
15 intervene, but surely there has got to be a way for the
16 public to be on the record, otherwise they are just
17 going to say -- I as a northerner, would say: Well,
18 it's just a...

19 MR. CAMPBELL: No, we are not
20 suggesting -- Mr. Martel, do not take me as suggesting
21 that I am saying that this is not on the record--

22 MR. MARTEL: I am just trying to
23 understand you.

24 MR. CAMPBELL: --and so on. I agree
25 fully that you have got to give an opportunity that is

1 a real opportunity and nobody will winkle out whether
2 it's real or not faster than the very people who turn
3 up in that room, let me tell you. That's what will
4 happen. So you have to get give them a real
5 opportunity, I agree with that.

6 All I am saying is that I have been
7 involved in a wide variety of cases in which there have
8 been all kinds of different methods adopted to deal
9 with this and that, on balance, that one seemed to work
10 out very well.

11 MR. MARTEL: I think we are agreeing in
12 most except that hiving them off to the corner together
13 sort of approach. I don't know what you do with that
14 then. I guess that is what I am asking you. What do
15 you do with that specific sort of incident? Do you
16 record it, do you not record it?

17 THE CHAIRMAN: No, but as I understand --

18 MR. CAMPBELL: If there was a matter --
19 if there was a particular local concern raised and
20 there was some resolution or not that was worked out,
21 or we said we would go away and investigate it or
22 something like that, sure those kinds of things can
23 come back and some of them will be put right on the
24 record and say, you know: Mr. so and so raised a
25 concern about a culvert and gravel washing into a

1 stream here and there, we have gone out to look at the
2 situation - this is a week later - we want to tell the
3 Board we went and had a look at it, you know, he was
4 quite right, or here is a picture, or whatever the heck
5 it was, and the matter has been resolved, whatever.

6 MR. MARTEL: So it still becomes part of
7 the record. I guess that's what I was getting at, Mr.
8 Campbell.

9 MR. CAMPBELL: You can do -- I am just
10 sort of making up an example here, but there are a
11 variety of different ways, if there is a very
12 particular local concern, of assuring the Board that
13 isn't just forgotten and assuring the individual that
14 it won't be forgotten in the Board's proceedings.

15 MR. MARTEL: Okay.

16 MR. CAMPBELL: There is lots of
17 creativity that can work around this to solve that very
18 particular problem which is part of the test as to
19 whether it provides a real opportunity. And I agree
20 with you one hundred per cent, it must provide a real
21 opportunity.

22 MR. MARTEL: Okay, thank you.

23 THE CHAIRMAN: Thank you, Mr. Campbell.

24 Ms. Cronk?

25 Ms. Swenarchuk, we will get back to you

1 in a moment.

2 MS. CRONK: Mr. Chairman, I can't comment
3 with particular experience on the proposal that Mr.
4 Campbell made, it has been many years since I was on
5 circuit in any way of this kind, but without any
6 instructions from our clients at all, there is a
7 proposition that some counsel have discussed and I
8 would like to make to you for your consideration.

9 It seems to me that there are a number of
10 factors have that to be balanced here and, of course,
11 the Board is more acutely aware of them than counsel.
12 But it is, first, that there be no unfairness to the
13 members of the public who are being invited to
14 participate in this process and that they -- that in
15 actual fact, as well as in perception, that their
16 involvement is seen to be real. That is one interest
17 that has to be balanced.

18 The second and equally important in my
19 view is that already alluded to by Ms. Murphy and, that
20 is, fairness to the witnesses, those individuals who
21 have already testified, have already been subject to
22 cross-examination, and whose evidence has been
23 completed. Without elaborating any further, that is a
24 different and equally substantive interest that has to
25 be taken into account.

1 There is a third, however, in my view and
2 that is fairness to the process and that is in essence
3 fairness to the Board. And I don't think there is any
4 counsel in the room who could not perhaps ad nauseum
5 account personal experience for you in this regard, but
6 I am sure the Board members in prior cases have had the
7 experience of receiving well-intentioned and meaningful
8 public submissions, but in some instances which are
9 markedly ill informed. And, in many instances, that is
10 the fault of counsel representing those interests
11 because they have not sufficiently informed members of
12 the public of the facts.

13 But all I am suggesting to you is that it
14 becomes very important in an exercise of this kind to
15 provide members of the public with an opportunity to
16 have factual questions answered so that the views they
17 ultimately express to you formally under oath are
18 informed and that they are not perceiving on
19 misperceptions of what the undertaking is all about or
20 what is proposed, because then the evidence becomes
21 potentially of less value to you in your
22 considerations.

23 I think that's quite a separate interest,
24 and prior panels of this Board and other tribunals have
25 addressed that very issue in their decisions, how one

1 accomplishes making that kind of information available
2 to members of the public.

3 Having said all of that, really what I
4 propose for your consideration again, clearly without
5 instructions from my clients - as counsel I am now
6 speaking - is an adaptation I think of what Ms. Murphy
7 has already suggested to you and; that is, that there
8 be an informational session held in the absence of the
9 Board in each locale, and let's take the first visit,
10 when all legal counsel final if they so chose could be
11 present, but clearly the MNR --

12 THE CHAIRMAN: This would be prior to the
13 final session.

14 MS. CRONK: Prior to the attendance of
15 the Board and in the absence of the Board, so that it
16 would be off the record but not formally be the receipt
17 of evidence, that MNR counsel would be present together
18 with such representatives of their client as they
19 determined to be appropriate, with direction from the
20 Board if that's appropriate, and such other legal
21 counsel as chose to be there with representatives of
22 their clients, if they deemed that to be appropriate,
23 and it be nothing more than an informational exchange
24 and an opportunity to respond to very specific
25 questions both as to the evidence that the Board had

1 received to date as to the facts concerning the
2 undertaking, what the undertaking was about.

3 That can be structured in any number of
4 ways and counsel in this room are sufficiently
5 experienced that they could put some proposals to you
6 so that you could satisfy yourself that it was going to
7 be sufficient.

8 There can be an introduction,
9 introductory statement made by counsel for the MNR, for
10 example, as to what was involved, documentation made
11 available and I would then suggest that on a different
12 day, perhaps the immediately following day and
13 evening - and you would do that in the day and the
14 evening to accommodate people who, because of their
15 working schedules can't be there during the day - the
16 next day the Board would be in attendance for a day and
17 evening session and would formally receive public
18 submissions in much the same that it's always
19 traditionally been done.

20 And that that would be evidence that you
21 would formally receive on the record that would be
22 transcribed, but people who chose then to give such
23 evidence under oath and to make submissions to you
24 would do so on the basis that they have had an
25 opportunity to have their questions answered.

1 Now, that doesn't solve in my mind at
2 least one remaining or lingering procedural difficulty
3 and that is the individual who shows up on day two not
4 having availed themselves of the opportunity to be
5 there on day one and perhaps some arrangement of the
6 kind that Mr. Campbell suggests can accommodate that.

7 But at least it doesn't put the Board in
8 the position where questions are being directed to you
9 which, because of legal procedures, cannot be answered
10 which creates a misperception in the minds of the
11 public. It does provide a very real and substantive
12 opportunity for the public, if they so wish, to seek
13 the information they require, but it also isn't unfair
14 to a witness.

15 It isn't also unfair to a witness who has
16 testified and whose testimony is complete. So it does
17 offer some attraction in that sense and, obviously,
18 there is many variations on the theme.

19 But if you approach the informational
20 session as something distinct from the receipt of
21 formal evidence, then I think you protect all those
22 interests.

23 THE CHAIRMAN: Thank you, Ms. Cronk.
24 That's a very helpful submission.

25 Ms. Swenarchuk?

1 MS. SWENARCHUK: I know we normally get
2 one kick at the can, but I assume that this session is
3 a little more informal.

4 THE CHAIRMAN: No, it is. We are seeking
5 guidance from counsel as much as anybody else, because
6 there particular hearing I think does not have a
7 parallel, at least in this panel member's experience,
8 and I would suggest it's a broader scope than most
9 hearings that the province has involved in.

10 MS. SWENARCHUK: I am going to disagree
11 with what Ms. Cronk has suggested, but I first want to
12 remind us all that we haven't discussed so far one of
13 the other interests, one of the other purposes, one of
14 the other values of this whole set of hearings.

15 We have talked about giving the public a
16 chance to make its statements to the Board and the
17 values of these hearings to the public, what we haven't
18 talked about so far is the value of the hearings to the
19 Board specifically and, I think that that is a very
20 important consideration, that the Board is going to
21 have an opportunity, through these meetings, to hear
22 probably pretty direct; not at all potential, not at
23 all theoretical, but very direct information about the
24 effects of this entire undertaking in various
25 communities.

1 And I think that is an invaluable source
2 of information for the Board, something that we should
3 all attempt to encourage and expedite and make as most
4 inviting as possible for the public.

5 THE CHAIRMAN: Why would we not hear that
6 in terms of the submissions made by the same members of
7 the public? I mean, if they hear something -- for
8 instance, the day before they go to this public
9 information session and the Board is not present to
10 have clarified certain questions that they ask of the
11 various parties and you can provide those answers --

12 MS. SWENARCHUK: Well, I think --

13 THE CHAIRMAN: And they disagree with
14 some of those, why can't they come to the Board the
15 following day and raise it as part of their submission?

16 MS. SWENARCHUK: I think we are asking a
17 lot of people to give up two days to do this and I
18 think that local people may not be too pleased to turn
19 up the day before and not find the Board there.

20 I think we are then again into this
21 question of perception and, you know, they know the
22 Board is supposed to be there, the Board is what is
23 important to them, they want to air their, in some
24 cases it will be complaints, positions before the
25 Board. To the extent they can get answers from the

1 proponent that is good, but basically the Board is
2 their focus and I don't think in terms of public
3 perception --

4 THE CHAIRMAN: But they are advised that
5 the Board is coming, the Board is coming to hear their
6 concerns and we'll be there to listen to their
7 submissions.

8 I mean, why would they feel that because
9 they have an additional opportunity to try and clarify
10 some of their misconceptions or appropriate conceptions
11 in advance of the Board coming, would that be
12 considered unfair because they will have an opportunity
13 very shortly after that to address the Board on those
14 concerns, and if they disagree with anything that they
15 are told the day before in any way, presumably they
16 would make that known to the Board the following day.

17 MS. SWENARCHUK: Well , I think you are
18 creating - perhaps onerous isn't the right word - but I
19 think you are putting -- requiring too much of people
20 to ask them to come back twice basically, and I also
21 believe that frankly people aren't coming to this for
22 an information session from the Ministry of Natural
23 Resources. The Ministry probably is in their
24 community.

25 As I say, the focus of their attention is

1 the Board and I think what is more important to them is
2 that the discussions that occur occur in the presence
3 of the Board and, you know, there is some sort of
4 interaction with the Board.

5 THE CHAIRMAN: Okay. You know, that is
6 accepted, but how do you propose to get around some of
7 the possible evidentiary type problems that we may get
8 into that have already been alluded to by both the
9 Ministry, Mr. Campbell and Ms. Cronk and others?

10 MS. SWENARCHUK: Well, I am not really
11 persuaded that those are very serious evidentiary
12 matters.

13 THE CHAIRMAN: Well, they may or may not
14 be, it depends what's said and what comes out, you see.
15 If it's the normal case where there is not many of
16 those difficult questions that require replies from
17 specific witnesses, that is one scenario.

18 If there are cases that are the opposite,
19 then you do have, in a formal process which is
20 quasi-judicial in nature like this one, some possible
21 evidentiary problems and you may be willing to give up
22 your right to cross-examine, but not every party may be
23 willing to do so.

24 MS. SWENARCHUK: Well, the submissions
25 that are coming from these parties will not cause a

1 problem, they simply come to the Board.

2 THE CHAIRMAN: We have no problem with
3 any of the submissions. If they want to make a
4 submission they are no different than any other party,
5 and as long as it's relevant to the matters before this
6 Board, they can make those submissions.

7 MS. SWENARCHUK: The only - and I would
8 expect that many of the questions that would come from
9 the public oriented largely to Ministry witnesses also
10 will not ultimately not cause a problem.

11 MS. CRONK: You can't possibly say that,
12 with respect.

13 MS. SWENARCHUK: No, I am saying I expect
14 most of them will not ultimately cause a problem. Yes,
15 there may be some that may.

16 THE CHAIRMAN: And what do we do at that
17 point; say they can't ask those questions.

18 MS. SWENARCHUK: No. I think they have
19 to have the opportunity to ask those questions and I
20 think that it is more important that those questions be
21 asked and answered in the presence of the Board and let
22 us then sort out the difficulties about
23 cross-examination, then to high waff a part of this
24 process and have it done privately without the Board
25 present.

1 I think in terms of public perception and
2 public right, that that is not the desirable way to go.

3 THE CHAIRMAN: But how does that accord,
4 Ms. Swenarchuk, with the number of proceedings that you
5 are probably familiar with where there have been public
6 information sessions held by proponents or public
7 workshops or - they go under a variety of titles.

8 There have been a number of hearings
9 where the application that is coming before the Board,
10 or in some cases before the Board, is discussed so that
11 the public at large is better informed and, therefore,
12 their questions and their concerns are more focused.
13 It's not just a shot in the dark because they aren't
14 privy to anything that's gone on and, in this case,
15 over the space of a year.

16 I mean, these are held quite frequently
17 as you are probably aware.

18 MS. SWENARCHUK: Well, let's look at it
19 this way. If we were to follow the proposal of having
20 an information session the day before and then the
21 hearing, I guess no one in the world including myself
22 can argue against holding information sessions.

23 The question then still would arise:
24 What about the person who comes the day the Board is
25 sitting who wasn't there before and has a question for

1 the Ministry. Are you going to then tell that person:
2 Sorry, you lost your opportunity to ask them off the
3 record and we are only hearing submission tonight.

4 And I don't feel that that would be an
5 acceptable way to proceed.

6 THE CHAIRMAN: Well --

7 MR. MARTEL: Would the people show up -
8 let me ask you the question - would the people show up
9 for the information centre or would they show up the
10 next day because they want to talk directly to the
11 Board. And that is your concern.

12 MS. SWENARCHUK: Well, precisely my view
13 is that they want to deal with the Board. They may
14 also have questions that they expect the Board to help
15 them answer with MNR.

16 So, again, what I was just saying - I
17 hope I'm replying to your question, Mr. Martel - sure,
18 I can't argue against an information session. I think
19 though we still have to be prepared for the other --
20 for the individuals who literally can't make both and
21 will come when the Board is there and I don't think any
22 of us want to be in the position of saying to them:
23 Sorry, we can't have your questions answered.

24 THE CHAIRMAN: But how do you answer the
25 questions if the witnesses aren't there to answer them

1 or if the witnesses that are there aren't the
2 appropriate witnesses?

3 MS. SWENARCHUK: Well, my proposal
4 earlier was to have some senior managers and some local
5 Ministry staff, people present, and I still think --
6 that, still in my submission, should be done on these
7 hearings. When the Board is there, these individuals
8 should as well be there:

9 THE CHAIRMAN: Ms. Murphy?

10 MS. MURPHY: I just wanted to make one
11 final comment. This has been very helpful because, as
12 you realize, this issue came up with Mr. Mander and it
13 was very important to us to hear what the Board had in
14 mind and what concerns you had and what the other
15 people here had to say.

16 I don't think at this point in time we
17 can resolve all of these issues. There are, as I
18 pointed out in the beginning, a series of things that
19 we had to think about.

20 I would suggest at this point that we
21 simply put the matter aside for a short period of time,
22 that would give us an opportunity to speak to our
23 friends and look at some of the creative options and
24 perhaps put a few of those before the Board. I think
25 what would be the most helpful way of dealing with the

1 matter at this point.

2 THE CHAIRMAN: Okay. That makes sense
3 because I think we have identified collectively most of
4 the major problems that can arise and I think you are
5 fully apprised of the Board's desire to give the public
6 a full and adequate opportunity to participate.

7 We have to protect a number of interests,
8 we want to do it with the least amount of difficulty
9 and perhaps if counsel can get together and discuss
10 this further some common position might be able to be
11 put forward that can also receive the approval of the
12 Board.

13 Just to help you along with respect to
14 two or three of the other items that you mentioned, Ms.
15 Murphy, at the outset. As far as notice goes, it would
16 seem to us that we would want to give adequate notice
17 to the local community that whatever form this session
18 is going to take is going to occur at a specified place
19 on a specified day and we set ahead of time that day.

20 I don't think it necessarily has to be a
21 full 30 days' notice or greater than that, it may be as
22 little as 15 days' notice, but what we are suggesting
23 is, is that not only should it be the newspaper notice
24 but perhaps some radio spots at the local radio
25 station, perhaps even a notice could be posted at a

1 community centre, if there was a community centre.

2 There is a variety of ways to give notice
3 and get the message across. And we found that for some
4 of these local community-type hearings radio spots, two
5 or three days' worth, are sometimes very effective, as
6 well as the local paper.

7 So I think we could probably settle when
8 we would hold the hearing and make the arrangements in
9 advance, but it doesn't have to be that far in advance.

10 We will try and plug it into a convenient
11 place in the evidence -- in the flow of the evidence as
12 we are going along.

13 We think it should be in September or
14 October and definitely not in the summer months, not in
15 August. We feel that those are the traditional
16 vacation months and we would not want to go in and hold
17 a community hearing where the public could then come
18 back and say: You came to our location in the middle
19 of the summer knowing nobody would be there. We don't
20 want that perception.

21 The details of notice would probably
22 indicate some kind of general statement the nature of
23 that local proceeding.

24 Now, as far as the support: It would be
25 advisable, I think, if we did not drag along all of

1 the documentation in connection with the main hearing,
2 at least not to this type of community hearing where a
3 major party is not making a major presentation.

4 Your suggestion I think in discussions
5 with Mr. Mander of perhaps arranging for fax facilities
6 to be set up connected with your operation in Thunder
7 Bay might be helpful in the sense that we might at
8 least be able to fax over appropriate documents if the
9 same should become necessary.

10 Our experience in these local situations
11 are there's not much in the way of documentation that
12 is necessary. Certainly there is not a large call on
13 many of the exhibits and, of course, we would bring
14 with us some of the exhibits that would normally be
15 expected to be there, such as the Class EA Document
16 itself, Exhibit 4 and, you know, a selection of some of
17 the other ones that we expect might be addressed.

18 Beyond that, if we don't have all of the
19 documentation there, we would probably have to attempt
20 to have the public's concerns answered in the absence
21 of those documents. We would perhaps have Mr. Mander
22 make an attempt in some way, if specific parties
23 contacted him in advance and requested any
24 documentation that was here to be brought, we could be
25 advised of that and perhaps the notice itself will

1 contain some statement to contact Mr. Mander should any
2 particular exhibit be required.

3 Because, let's face it, some of these
4 members of the public may be following these
5 proceedings in terms of the transcripts.

6 How long, we'd have to play that by ear.
7 We would think that it probably wouldn't take more than
8 two or three days.

9 And where would be dependent really on
10 which location we chose and what the facilities are
11 like and what we expect to be in terms of the numbers
12 of public turning out. Community hall, arena,
13 wherever.

14 So you might take those general
15 directions into account when counsel is getting
16 together to consider these matters.

17 MS. CRONK: Mr. Chairman, do you
18 ultimately wish to hear from counsel as to the proposed
19 location or locations?

20 THE CHAIRMAN: Yes, that would be helpful
21 if any counsel have given that any thought. You mean
22 now or later?

23 MS. CRONK: No, I mean later.

24 THE CHAIRMAN: Yes. You might also give
25 that some consideration. Make sure you choose it from

1 the list that we have already dealt with. We don't
2 want to extend that number of locations much more.

3 Yes?

4 MS. SEABORN: Mr. Chairman, just
5 following along from that. Could Mr. Mander provide us
6 with--

7 THE CHAIRMAN: That letter?

8 MS. SEABORN: --information as to what
9 locations the full-time or part-time parties have
10 requested they call their evidence in.

11 THE CHAIRMAN: Yes.

12 MS. SEABORN: Because that may be a way
13 of determining the initial location.

14 THE CHAIRMAN: Yes. And I understand,
15 Mr. Mander, that we have specifically requested of all
16 parties an indication of where they would like to
17 present their evidence and we should have that on file;
18 is that not correct?

19 MR. MANNING: Yes.

20 THE CHAIRMAN: Okay. We will have Mr.
21 Mander provide that to counsel.

22 MS. SEABORN: Thank you.

23 MS. MURPHY: Should we set a return date
24 for this matter? Do you think that would help at this
25 point or should we raise it again?

1 THE CHAIRMAN: Well. Why don't we
2 perhaps try and address this, if you like, in the
3 Toronto session on one of those two days, June 1 and
4 2nd I think.

5 MS. MURPHY: I think we can probably
6 manage to have some things together by then.

7 THE CHAIRMAN: Okay. Anything further?
8 (no response)

9 Very well. We will adjourn for the day
10 and see you all later. Thank you.

11 We will start tomorrow at 8:30.

12 ---Whereupon the hearing adjourned at 4:50 p.m.,
13 to be reconvened on Wednesday, May 10th, 1989,
commencing at 8:30 a.m.

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